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# Analysis

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## Not Law (But Not Yet Effectively Not Law)

The United Kingdom Supreme Court (“UKSC”) had this to say about a provision of an Act of the Scottish Parliament:<sup>1</sup>

The difference in treatment has no logical justification. It is unfair and disproportionate. It is no answer to this criticism to say that there was an urgent need to meet the problem that had been identified. The legislation was intended to have an effect which was permanent and irrevocable.

This is hardly a ringing endorsement of the exercise of the Parliament’s devolved powers. In March 2012 the Court of Session had held that section 72 of the Agricultural Holdings (Scotland) Act 2003 violated Salvesen’s rights under article 10f of the first protocol to the European Convention on Human Rights (“A1P1”).<sup>2</sup> Section 72 was, therefore, beyond the Parliament’s legislative competence<sup>3</sup> and, as such, was “not law”.<sup>4</sup> The Court of Session’s interlocutor was not final,<sup>5</sup> nor did it issue one that was final and calibrated to provide a full remedial response to its finding, instead granting leave to appeal to the UKSC on 29 March 2012,<sup>6</sup> thus rendering further procedure in the Court of Session inappropriate. The Second Division’s interlocutor, as it stood, declared the entirety of section 72 to be in violation of the Convention, and hence beyond the Parliament’s competence.

This contextual background is important, for while the UKSC allowed the appeal it did so in a manner that left much of the substance of the Second Division’s findings undisturbed – the UKSC only recalled the interlocutor in order to substitute

1 *Salvesen v Riddell* [2013] UKSC 22 at para 44 per Lord Hope of Craighead (with whom Lords Kerr, Wilson, Reed and Toulson agreed).

2 *Salvesen v Riddell* [2012] CSIH 26, 2012 SLT 633 at para 107 per the Lord Justice Clerk (Gill) (hereafter “*Salveson* (IH)”).

3 Scotland Act 1998 s 29(2)(d). See also D J Carr, “Not law” (2012) 16 EdinLR 410; M M Combe, “Human rights, limited competence and limited partnerships: *Salvesen v Riddell*” 2012 SLT (News) 193.

4 Scotland Act 1998 s 29(1).

5 *Salvesen* (IH) at para 105.

6 *Salvesen* at para 30. Leave was required as the case concerns the competence of an Act of the Scottish Parliament, which is a devolution issue: Scotland Act 1998 Sch 6 paras 1(a) and 13(b).

the narrower finding that section 72(10) violated the Convention, and was therefore beyond the Parliament's competence.<sup>7</sup> Confirmation that the impugned provision was in violation of the Convention – and clearly so – is not surprising. However, the case provides the first guidance about what the courts will do when faced with an *ultra vires* Act of the Scottish Parliament.

### A. MINISTERS AND PARLIAMENT

Ministerial conduct featured prominently in Lord Gill's opinion in the Second Division.<sup>8</sup> In his opinion, it was appropriate to consider statements of ministers to Parliament during the passage of the Agricultural Holdings (Scotland) Bill to assist in identifying the justification behind section 72.<sup>9</sup> Searching for such a justification was a component of the well-known proportionality test in relation to A1P1.<sup>10</sup>

Interference with a property right must be in the public interest, but national parliaments enjoy discretion in a question with national courts to determine what is in the public interest by virtue of the national courts' respect for their democratically derived primacy<sup>11</sup> (and not under the margin of appreciation, which is a component of the European Court of Human Rights' (ECtHR) supranational jurisdiction<sup>12</sup>). This much has been clear since *James v UK*<sup>13</sup> demonstrated that the jurisprudence of the ECtHR in this area is premised upon judicial deference to the national authorities' evaluation of political, economic and social issues.<sup>14</sup> Domestic courts have, despite not being bound to do so,<sup>15</sup> followed Strasbourg's lead and acknowledged the domestic decision maker's wide discretion.<sup>16</sup> The scope and importance of that discretion is underscored by its applicability both

7 *Salvesen* at para 58.

8 *Salvesen* (IH) at paras 87-96.

9 At para 87.

10 On proportionality generally, see Lord Reed's important recent (dissenting) opinion in *Bank Mellat v Her Majesty's Treasury No 2* [2013] UKSC 39 at paras 68-76; more generally, see A Barak, *Proportionality* (2012).

11 *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 at para 32 per Lord Hope and para 131 per Lord Reed.

12 *R v DPP ex parte Kebilene* [2000] 2 AC 326 at 380E-381D per Lord Hope; *Brown v Stott* 2001 SC (PC) 43 at 58I-59A per Lord Bingham.

13 *James v United Kingdom* (1986) 8 EHRR 123.

14 *Vistiņš and Perepjolkins*, App no 71243/01, 25 October 2012 at para 106.

15 Human Rights Act 1998 s 2(1)(a). See *Regina (Ullah) v Special Adjudicator* [2004] 2 AC 323, and the recent interpretations in *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 at paras 110-114 per Lord Brown; *Hamilton v Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486 at para 49 per the Lord President (Hamilton); *Achmant v Greece* [2012] EWHC 3470 (Admin) at paras 26-27 per Singh J; *Richards v Ghana* [2013] EWHC 1254 (Admin) at paras 50-52 per Leggatt J. The "Ullah principle", as developed by the UKSC, is followed by the Scottish courts: "It may be that the 'Ullah doctrine' is ripe for reconsideration or reformulation but, given its repeated application in the Supreme Court, it is not for this court to attempt any such reconsideration or reformulation." *Ross v HM Advocate* [2012] HCJAC 45 at para 28 per the Lord Justice General (Hamilton).

16 *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122.

to the instrument adopted and any assessment of the proportionality of that instrument.<sup>17</sup>

Lord Gill's analysis of possible justifications, which might be contained within ministerial statements, concluded that section 72 was essentially "retaliatory" and "punitive".<sup>18</sup> Lord Hope was more cautious: "...one must be careful not to treat a ministerial or other statement as indicative of the objective intention of Parliament".<sup>19</sup> Moreover, the question of Convention compliance and the competence of section 72 was to be "judged primarily by what the section provides, not by what was said by the deputy minister".<sup>20</sup> Lord Hope's cautious approach must be technically correct, though one might argue that the Lord Justice Clerk's is more in tune with the realities of modern legislating. Indeed, there is some uncertainty about when it is appropriate to examine ministerial statements in order to ascertain the aims and objectives of legislation. In *Wilson v First County Trust Ltd*<sup>21</sup> Lord Hope noted that reference might be made to ministerial statements when seeking to ascertain whether the aim behind legislation was legitimate.<sup>22</sup> As Lord Hobhouse noted:<sup>23</sup>

The questions of justification and proportionality involve a sociological assessment—an assessment of what are the needs of society. This in part involves a legal examination of the content and legal effect of the relevant provision. But it also involves consideration of what is the mischief, social evil, danger etc. which it is designed to deal with. Often these matters may already be within the knowledge of the court. But equally there will almost always be other evidentially valuable material which can be placed before the court which is relevant... To exclude such evidential material from the case merely because it is to be found in some statement made in Parliament is clearly wrong, particularly if ministerial statements made outside Parliament were already being relied on. This has nothing to do with investigating or questioning the will of Parliament. Parliament has spoken by passing the relevant Act. The evidence is admitted because it relates to making the required sociological assessment.

Lord Hobhouse's analysis is attractive in the sense that it recognises that the text of an enacted statute will always represent Parliament's will, but the objectives and motivations underpinning the exercise of that will are theoretically distinct. One could argue that Lord Gill's approach is consistent with this analysis, and indeed with Lord Hope's earlier speech in *Wilson*. Likewise, in *Axa*,<sup>24</sup> when examining whether the Damages (Asbestos-related Conditions) (Scotland) Act 2009 had been pursuing a legitimate aim, Lord Hope quoted liberally from ministerial statements, regulatory

17 *Hermann v Germany*, Application no. 9300/07, 26 June 2012 at para 74; *Depalle v France* (2012) 54 EHRR 17 at para 83; *Chassagnou v France* (2000) 29 EHRR 615 at para 75; *Fredin v Sweden* (1991) 13 EHRR 784 at para 51; *Allgemeine Gold-und Silberscheideanstalt v UK* (1987) 9 EHRR 1 at para 52.

18 *Salvesen* (IH) at para 90.

19 *Salvesen* at para 37, relying on *Wilson v First County Trust Ltd* (No 2) [2004] 1 AC 816 at para 66 per Lord Nicholls.

20 *Salvesen* at para 39.

21 *Wilson v First County Trust Ltd* (No 2) [2004] 1 AC 816.

22 *Wilson* at para 118.

23 At para 142; Lord Rodger expressly adopted Lord Hobhouse's analysis (para 178).

24 *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122.

assessments and explanatory notes to the Bill.<sup>25</sup> The fact that he acknowledged that ministerial statements were not “irrelevant” and could provide “important information” about the purpose of legislation arguably only obscures matters, coming as it does after exhortations to distinguish the Scottish ministers from the Scottish Parliament. Indeed, examination of the gestation and evolution of the discriminatory provisions in a vacuum, bereft of ministerial statements, comes to a similar conclusion but bears an air of artificiality. It may not be possible to adopt a rigid rule, and there are grounds in both authority and common sense for the two approaches.

## B. SECTION 72 AND A1P1

The UKSC took a somewhat narrower approach to the compatibility of section 72 than that taken by the Second Division. The language used in Lord Gill’s opinion suggests that the whole of section 72 was incompatible with Convention rights and the interlocutor of the court reflected this.<sup>26</sup> Given the fact that the Second Division had not yet heard submissions about the severability of components of legislation in such a situation, indeed the court specifically invited them for a future hearing,<sup>27</sup> this is unsurprising. The UKSC had the benefit of more specific submissions and identified the key provision to be section 72(10).<sup>28</sup> The significance of section 72(10) is that it acts as a gatekeeper provision: it determines whether or not landlords will be able to terminate a tenancy using section 73. The importance of section 73 is that it allows landlords to bring tenancies to an end by notice<sup>29</sup> without the necessary involvement of the Land Court, which is an attractive counterpoise to the security of tenure afforded to tenants in certain circumstances.<sup>30</sup>

The challenge to section 72(10) rested upon its gatekeeper effect in that it prevented landlords<sup>31</sup> who had given notice between 16 September 2002<sup>32</sup> and 30 June 2003<sup>33</sup> from availing themselves of the benefits of section 73 (landlords giving notice after 30 June 2003 could use section 73). Section 72(10) is, therefore, patently discriminatory and operates to penalise some landlords retrospectively.<sup>34</sup> The appellant’s argument, that such discrimination constituted a proportionate and justified legislative response to avoidance on the part of the Scottish Parliament within its wide policy discretion under A1P1, was emphatically rejected,<sup>35</sup> as it had been in the Inner House.<sup>36</sup> The key was the absence of a rational explanation for

25 At paras 29-30.

26 *Salvesen* (IH) at para 107.

27 At para 105.

28 *Salvesen* at para 41.

29 Agricultural Holdings (Scotland) Act 2003 s 73(3).

30 Section 72(6).

31 Under a tenancy subsisting as a result of s 72(6).

32 In conjunction with Agricultural Holdings (Scotland) Act 2003 s 72(3)(a).

33 Section 72(10)(b)(i), and Agricultural Holdings (Relevant Date and Relevant Period) (Scotland) Order SSI 2003/294 at para 2.

34 *Salvesen* at para 42.

35 At para 44.

36 *Salvesen* (IH) at para 97.

the difference in treatment between those giving notice before and after 30 June 2003. Both courts held that this (unjustified) differential treatment was so clearly set out that section 72(10) could not be ameliorated by reading the impugned provision according to the appropriate interpretative canons set out in the Scotland Act 1998 and Human Rights Act 1998.<sup>37</sup> Section 72(10) could not be saved.

### C. REMEDIAL ACTIONS

One of the most interesting elements of the decision is the question of remedies: what practical actions would the court take when confronted by a piece of legislation that was outwith the competence of the Scottish Parliament? Lord Hope situated his discussion of the various statutory remedies within a broader context of principle: although a problem had been found with the legislation, it remained a matter of policy, and therefore a question for the Parliament, to consider how to respond to the incompatibility.<sup>38</sup> Finding section 72(10) to be incompatible with A1P1 was exacerbated by its gatekeeper role: without it section 73 is a dead letter.<sup>39</sup> Taking the principle of deference to the democratic process alongside the potentially stark consequences of the incompatibility finding, the court restricted its finding to section 72(10) because “the finding of incompatibility ought not to extend any further than is necessary to deal with the facts of this case, and it is important that accrued rights which are not affected by the incompatibility should not be interfered with.”<sup>40</sup>

The selection of a remedy must, therefore, be seen in the context of principle set out by Lord Hope that repair of the section is for the democratically elected Parliament. A court deciding that an Act of the Scottish Parliament is incompetent can remove or suspend the retrospective effect of the decision.<sup>41</sup> Any order varying the normal temporal effect of a decision must have “regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected.”<sup>42</sup> The court considered that the effect of section 72(10) on landlords was such that it could not suspend the retrospective effect of the decision,<sup>43</sup> because to do so would constitute a breach of Convention rights by the court under section 6 of the Human Rights Act 1998.<sup>44</sup> At the same time the potential effects of the incompatibility on section 73 could cause substantial disruption to closed transactions and prejudice to tenants.<sup>45</sup> Lord Hope recognised that the intricate legislative repair work needed to remove the incompatibility would have to balance these concerns. The Parliamentary processes of consultation and debate, with the benefit of the Scottish government’s assistance, were the appropriate

37 Para 49.

38 Para 51.

39 Para 50.

40 Para 51.

41 Scotland Act 1998 s 102(2)(a)–(b).

42 Section 102(3).

43 *Salvesen* at para 57.

44 Para 54. The court, of course, being a public authority for the purposes of the Human Rights Act 1998.

45 Para 55.

institutional mechanism to evaluate and address such difficulties. It was recognised that the necessary institutional response would take time, and this was something the court could give by suspending the effect of its decision that section 72(10) was not law for twelve months or such shorter period as required to address the incompatibility.<sup>46</sup>

#### D. CONCLUSION

The decision in *Salvesen* is the first time that the UKSC has decided that an Act of the Scottish Parliament contains provisions that are beyond the Parliament's competence. The substantive breach of A1P1 by section 72(10) is patent, and the language used by judges in both the Inner House and the UKSC reflects that fact. A question that looms large is why the pre-legislative safeguards to ensure that legislation would be Convention compliant failed to pick up so clear a breach of Convention rights. The presiding officer,<sup>47</sup> law officers,<sup>48</sup> ministers<sup>49</sup> and ultimately, if a little unfashionably, the members of the Scottish Parliament all have a role in ensuring that the Parliament's legislation is competent. Some cover might be found in the convoluted drafting of the section, but it is hard to resist the conclusion that the safeguards operated as an ineffective rubber-stamping exercise, or alternatively people were asleep at the wheel. By any standard this was not the Parliament's finest hour in terms of legality.

The UKSC's reaction to the (technical) incompetence is significant. This is the latest in a series of decisions where the UKSC has explained the different roles of the court and the Parliament, emphasising the respect that courts will accord to the Parliament's proper discretion when legislating. The court's scrutiny of the proportionality of the impugned provision quite properly showed deference to the broad legislative discretion associated with A1P1. However, provisions which are unfair, disproportionate and lacking in logical justification are outwith the parameters of the legislature's discretion. Nevertheless, the remedial response adopted by the court demonstrates sensitivity to a number of factors and adopts an almost co-operative approach: the Parliament's democratic legitimacy and institutional advantages make it the appropriate organ to rectify the problem, and that rectification will be facilitated by the court's order suspending the effect of the decision. In light of the failure of pre-legislative scrutiny this does not necessarily inspire confidence. Such a co-operative approach is made clearer by the UKSC explicitly granting permission to the Lord Advocate to return to the Court of Session to ask for further orders to assist with the process. Granting this permission not only hints at a discursive co-operation generally, it also draws the Scottish government into that discourse—the Lord Advocate is not the parliament's law officer, he is the

<sup>46</sup> Paras 57-58.

<sup>47</sup> Scotland Act 1998 s 31(2).

<sup>48</sup> Section 33(1).

<sup>49</sup> Section 31(1). Note that now, though not when the legislation in this case was introduced, any person "in charge of" a Bill must state whether he thinks it is within Parliament's legislative competence.

government's – thus recognising the government's interest as the instigator of the 2003 Act.<sup>50</sup> The UKSC's approach is also sensitive to its supra-jurisdictional role: didactic provision of authoritative answers on the interpretation of the ECHR and then remitting the entirety of the next stage to the Scottish institutions, is consistent with the approach of supra-jurisdictional courts. So section 72(10) is not law – and never has been – but the effects of that finding are postponed to another day.

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## Scotland: Twice as Much Criminal Law as England?

Concern has been expressed in recent times over the proliferation of criminal offences.<sup>1</sup> Claims that the UK Government had created over 3,000 offences in a ten year period<sup>2</sup> led to the introduction in England and Wales of a system whereby any civil servant wishing to create a criminal offence needs to obtain “gateway clearance” from the Secretary of State for Justice before doing so.<sup>3</sup> No such mechanism exists in Scotland, where the issue has received rather less attention.<sup>4</sup> Yet the Scottish Parliament has created criminal offences at a far greater rate than its English counterpart. In this note we demonstrate that, over the course of a twelve month period between 2010 to 2011, twice as many criminal offences applying to Scotland were created compared to those applying to England. We analyse this difference and demonstrate that over that period Holyrood showed a far greater propensity to create criminal offences than Westminster, with 165 offences being created by Holyrood for Scotland alone over that period as against a mere 10 created by Westminster for England or England and Wales alone.

50 Cf the approach above, however.

1 See e.g. A Ashworth and L Zedner, “Defending the criminal law: reflections on the changing character of crime, procedure and sanctions” (2008) 2 Criminal Law and Philosophy 21 at 22, 32; C Pantazis, “The problem with criminalisation” (2008) 74 Criminal Justice Matters 10; A Crawford, “Governing through anti-social behaviour: regulatory challenges to criminal justice” (2009) 49 BJ Crim 810 at 826.

2 See N Morris, “Blair’s ‘frenzied law making’: a new offence for every day spent in office”, *The Independent*, 16 August 2006. In fact, the true figure is almost certainly much higher than this, with 1395 offences created in the first year of the New Labour government alone. See J Chalmers and F Leverick, “Tracking the creation of criminal offences” [2013] Crim LR 543.

3 Ministry of Justice, *Criminal Offences Gateway Guidance* (2011), available via [www.justice.gov.uk/legislation/criminal-offences-gateway](http://www.justice.gov.uk/legislation/criminal-offences-gateway).

4 Although see P R Ferguson, “Criminal law and criminal justice: an exercise in adhocery”, in E E Sutherland et al (eds), *Law Making and the Scottish Parliament: The Early Years* (2011) 208 at 216.



## A. THE STUDY

It is surprisingly difficult to find information about the number and characteristics of criminal offences “on the books” in the UK. Criminal law teaching and scholarship tends to focus on “core crimes”, such as offences against the person or the general offences of dishonesty,<sup>5</sup> but these account for only a tiny part of the criminal law. Various attempts have been made to quantify the number of criminal offences in existence in the UK, but these have tended to be limited in some way and have often been by-products of analysis rather than its central focus.<sup>6</sup>

It was against this background that we embarked on a project intended to rectify this lacuna. The aim of the project was not to identify every single criminal offence on the books in the UK: this would have been a monumental undertaking far beyond the resources we had at our disposal. Rather it was (a) to establish a methodology for recording the number and characteristics of criminal offences created during a particular period and (b) to carry out this exercise for two time periods each of one year.<sup>7</sup> The time periods selected were the first year of the Coalition government (that is, all offences created from 6 May 2010 to 5 May 2011) and the first year of the New Labour government (from 2 May 1997 to 1 May 1998).<sup>8</sup> For each period, we reviewed all Acts of Parliament, Acts of the Scottish Parliament, statutory instruments and Scottish statutory instruments to identify offence creating provisions. The inclusion of secondary legislation in this exercise was important. Attempts to estimate the number of criminal offences often ignore such instruments, but far more offences are created via secondary legislation than via primary legislation.<sup>9</sup>

Identifying an offence creating provision is, however, only the first stage in any exercise aiming to record the number of criminal offences because a single statutory provision can – and often does – create multiple offences.<sup>10</sup> Our next task was, therefore, to examine each offence creating provision with a view to determining whether it created a single offence or multiple offences (and in the latter case how many separate offences it created). For the most part, this was a reasonably straightforward – if time consuming – exercise. In other instances, it was far more

5 W Stuntz, “The pathological politics of criminal law” (2001) 100 *Michigan LR* 505 at 512.

6 See Chalmers and Leverick (n 2) at 544-545.

7 We are grateful to the University of Edinburgh School of Law (where James Chalmers worked during the initial stages of this research) for providing funding through its Strategic Investment Fund which allowed us to employ Peter Lewin as a research assistant, and we are in turn grateful to Peter for his hard work.

8 We treated the government’s first year in office as having begun the day after the relevant General Election, and treated an offence as having been created on the day on which the relevant statute received Royal Assent or the statutory instrument was made.

9 Our research found that 99 per cent of offences created in 1997-98 and 86 per cent of offences created in 2010-11 were contained in secondary legislation. See Chalmers and Leverick (n 2) at 550.

10 See, for example, regulation 91(a) of *The Feeding Stuffs (Establishments and Intermediaries) Regulations 1998*, a single statutory provision which prohibits 48 distinct acts or omissions, targeted at varying audiences and often attracting different maximum penalties.

**Table 1.** Offences created 1997-98 and 2010-11

<b>Geographical extent</b>	<b>1997-1998</b>	<b>2010-2011</b>
UK	1022	409
Britain	213	4
England	None	212
England and Wales	None	9
Wales	None	314
Scotland	3	810
Northern Ireland	52	2
Isle of Man	53	None
Channel Islands	52	None
Total	1395	1760

problematic.<sup>11</sup> It also proved surprisingly difficult sometimes to identify the nature of the prohibited conduct, as legislative drafting techniques can be astonishingly complex, rendering the results all but inaccessible except to those possessing dogged persistence and not a small modicum of legal knowledge.<sup>12</sup>

Finally, once individual offences had been identified, we recorded for each offence its salient characteristics, including its maximum penalty; its geographical extent; its subject matter; any special capacity associated with it; and whether or not *mens rea* was required.

## **B. CRIMINAL OFFENCES AND THEIR GEOGRAPHICAL APPLICATION**

We have presented elsewhere a more comprehensive report of the results of our research.<sup>13</sup> Here we wish to focus on just one aspect of the study: some interesting differences that have emerged between Scotland and England and Wales in terms of the number of offences created during the two time periods in question. Table 1 displays the number of offences created in each of these periods, both in total and according to their geographical application.

As table 1 shows, the bare figures are astonishing – 1395 criminal offences were created in 1997-98 and 1760 in 2010-11. But the geographical differences are also interesting.

In 1997-98, there was very little difference between patterns of offence creation in Scotland, England and Wales. The vast majority of criminal offences in the sample extended either to “Great Britain” or to “the UK” and thus applied to all three

11 In J Chalmers and F Leverick, “Quantifying criminalisation”, in R A Duff et al (eds), *Criminalization: The Aims and Limits of the Criminal Law* (forthcoming) we discuss in detail the methodological issues that we faced and the solutions we adopted.

12 An issue we discuss in Chalmers and Leverick (n 2). See also J R Spencer, “The drafting of criminal legislation: need it be so impenetrable?” (2008) 67 CLJ 585; P R Ferguson, “The drafting of offence provisions by the Scottish Parliament” (2011) 32 Stat LR 161.

13 See Chalmers and Leverick (n 2). See also Chalmers and Leverick (n 11).

jurisdictions. In 2010-11, however, the picture was very different. The number of offences applying only to England was 212 (or, if those applying to “England and Wales” are included, 221), whereas the number applying specifically to Scotland was 810. If the 413 criminal offences applying to the UK/Britain are added to these figures, this means that almost twice as many offences were created in 2010-11 that applied to Scotland (a total of 1223) compared to England (a total of 634).

The fact that it was more common in 2010-11 for offences to be created applying only to one or more of the constituent parts of the UK is not, in itself, terribly surprising. In 1997-98, the modern Scottish Parliament did not exist and thus whenever a need arose to pass criminal legislation covering the whole of the UK – to implement a European Directive requiring criminal measures, for example – this would have been done by the way of a single legislative instrument. With the advent of the Scottish Parliament (and the Welsh Assembly and the Northern Ireland Assembly), European legislation that lies within the legislative competence of these law making institutions is frequently implemented separately for England, Wales, Northern Ireland and Scotland.<sup>14</sup>

What is surprising is the fact that in 2010-11 so many more offences were created by the Scottish Parliament compared to its Westminster counterpart (when the latter was legislating specifically for England or for England and Wales).

### C. ACCOUNTING FOR THE DIFFERENCE

The difference is a stark one. Although the “headline figures” indicate that twice as many offences were created in Scotland as in England and Wales over 2010-11, if we are to understand the difference we must strip out all those offences which applied to the whole of the UK or to Britain. As we note above, in 2010-11 there were 810 offences created which applied to Scotland alone, compared to 221 which applied to England or England and Wales alone.

Beyond this, we should disregard the relatively small number of offences created at a “limited local level”:<sup>15</sup> byelaws, transport and Work Act orders and harbour orders. We should also disregard offences created in order to implement European legislation – there is a significant difference over this period, but that seems largely to be due to coincidences of time (because European obligations might have been implemented within the time period we analysed for one part of the UK but not another)<sup>16</sup> or the use of consolidation instruments.<sup>17</sup> Over time, the extent of criminalisation based on European obligations should be very similar throughout the UK.

14 See e.g. the Beef and Veal Labelling Regulations 2010, SI 2010/983; the Beef and Veal Labelling (Scotland) Regulations 2010, SSI 2010/402; the Beef and Veal Labelling (Wales) Regulations 2010, SI 2011/991 (W 145); and the Beef and Veal Labelling (Northern Ireland) Regulations 2010 (SI 2010/155).

15 20 such offences were created in England over 2010-11 and five in Scotland.

16 See e.g. the Beef and Pig Carcase Classification (Scotland) Regulations 2010, SSI 2010/330 (which fell within our sample period) and the corresponding English legislation, the Beef and Pig Carcase Classification (England) Regulations 2010, SI 2010/1090 (which did not).

17 See e.g. the Water Environment (Controlled Activities) (Scotland) Regulations 2011, SSI 2011/209.

All this only serves to make the difference more remarkable. It leaves 224 offences created in Scotland over 2010-11, as compared to only ten in England. The English offences comprised nine under the Health Protection (Local Authority Powers) Regulations 2010<sup>18</sup> and one under the Health Protection (Notification) Regulations 2010.<sup>19</sup> The 224 Scottish offences were found in one Act of the UK Parliament (creating two offences),<sup>20</sup> one statutory instrument (creating 57 offences)<sup>21</sup> fifteen Acts of the Scottish Parliament (creating 149 offences)<sup>22</sup> and six Scottish statutory instruments (creating 16 offences).<sup>23</sup>

We might disregard the 59 offences created for Scotland by UK legislation as telling us nothing about Holyrood's propensity to create criminal offences. Nevertheless, that leaves 165 offences created by Holyrood for Scotland as compared to ten created by Westminster for England.<sup>24</sup> Why this remarkable difference?

At this stage in our work, any answer must be somewhat speculative. One obvious possibility is that, because our analysis is framed around the date of a UK General Election, we have examined a period in which Westminster was able to pass less legislation than Holyrood. That seems correct: over the year, 14 Acts of Parliament received Royal Assent, compared to 25 Acts of the Scottish Parliament.<sup>25</sup>

However, this is only a partial explanation, and it highlights one remarkable fact. None of those 14 Acts of Parliament passed by Westminster created criminal offences. By contrast, Holyrood appears to have great difficulty regulating without criminalising: 15 of the 25 Scottish Acts created criminal offences.<sup>26</sup> This is a common pattern – legislation which is not on its face “criminal”<sup>27</sup> will include a regulatory scheme backed up by criminal penalties, such as failing to register transfers of land or changes of landlord under the Crofting Reform (Scotland) Act 2010 or failing to comply with notices issued under the Historic Environment (Amendment) (Scotland) Act 2011.

It may often be legitimate to use the criminal law in this way, and at this stage we pass no comment on the manner in which the Scottish Parliament has done so.

18 SI 2010/657.

19 SI 2010/659.

20 The Parliamentary Voting System and Constituencies Act 2011 part 1 of sch 4, which applies certain provisions of the Representation of the People Act 1983 “with modifications” to the Alternative Vote referendum.

21 The Scottish Parliament (Elections etc.) Order 2010, SI 2010/2999. This replaced an existing order and so is unlikely to have created many – if any – new criminal offences, although we have not analysed this directly.

22 In 2010: asp 9, 13, 14, 16, 17. In 2011: asp 1, 2, 3, 6, 8, 9, 11, 13, 14, 15.

23 SSI 2011/182, SSI 2011/183, SSI 2011/184, SSI 2011/185, SSI 2011/210 and SSI 2011/215.

24 Including offences created by the relevant governments by way of statutory instruments rather than by Parliament itself.

25 Excluding one Private Act.

26 And two of those that did not were criminal procedure legislation: the Double Jeopardy (Scotland) Act 2011 and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

27 The Acts over this period which one might expect, on the basis of their short titles, to create offences were the Criminal Justice and Licensing (Scotland) Act 2010 (29 offences); the Domestic Abuse (Scotland) Act 2011 (one offence); the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 (one offence); and possibly the Control of Dogs (Scotland) Act 2010 (one offence).

The contrast with English legislation may suggest that the gateway procedure there has been effective in its aims and that civil servants have sought to use the criminal law as a tool of last resort in regulation, although the contrast may be due also to differences in legislative subject matter. In this short note, however, we hope we have demonstrated that Holyrood's propensity to create criminal offences is a cause for concern.

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## The Admissibility of Previous False Allegations of Sexual Assault: *CJM (No 2) v HM Advocate*

### A. BACKGROUND

*CJM* is an interesting, if inconclusive, High Court decision by a bench of five judges.<sup>1</sup> Given its “very fact sensitive”<sup>2</sup> nature, it is essential to rehearse the salient details. In 2011 the appellant was convicted of four charges relating to the sexual abuse of three female children during the 1990s but the appeal was primarily concerned with the testimony of only one of those victims, CD. The allegations were first made to the police in 2008 by the other two victims, who were sisters, and CD then “reluctantly” made a statement to the police in 2009 about the abuse perpetrated upon her by the appellant between 1994 and 1998 when she was aged between 6 and 10.<sup>3</sup> The defence lodged a pre-trial application under section 275 of the Criminal Procedure (Scotland) Act 1995<sup>4</sup> seeking permission to put to her that two and a half years before making the current allegation, at which time she was 17, she had made a false claim to the police of sexual assault by a third party. The defence argued that this was relevant because it went to the credibility of CD's complaint of historic sexual abuse.<sup>5</sup>

The allegedly false allegation related to an incident when CD and her friend turned up at a house in the country, apparently distressed, claiming that they had accepted a lift from a male who had driven them to some woods and asked them to perform sexual acts for payment. The house's occupant drove them home and phoned the police the following day to check on their welfare. No complaint had been received but the police traced and interviewed the two girls. CD repeated their earlier account but her friend stated that they had willingly accompanied the man, to whom

1 *CJM (No 2) v HM Advocate* [2013] HCJAC 22.

2 *CJM v HM Advocate* [2012] HCJAC 83 at para 22.

3 *CJM (No 2)* at para 3.

4 Section 274 of the Criminal Procedure (Scotland) Act 1995 prohibits complainers in sexual offence trials from being questioned about their sexual history or bad character (the “rape shield”), but s 275 sets out an exception based on a three-stage test. See P Duff, “The Scottish ‘rape shield’: as good as it gets?” (2011) 15 EdinLR 218.

5 *CJM (No 2)* at para 6.

they had previously prostituted themselves, but that they had changed their minds on this occasion. CD was re-interviewed two days later and admitted to fabricating the allegations of abduction and unsolicited sexual demands, although other parts of her account “were found to be factual”.<sup>6</sup> She was cautioned and charged with wasting police time but no prosecution followed.

At a preliminary hearing, the section 275 application was refused on the grounds that the evidence was “collateral and inadmissible at common law” and “[i]n any event it is not relevant”.<sup>7</sup> It was renewed at trial before a different judge but refused on the ground that no “special cause” had been shown to justify it.<sup>8</sup> The trial judge observed that, in any event, it was “collateral” under the common law “having regard to the time and circumstances of the charge.” In addition, under the statutory rape shield, it did not pass the third leg of the relevant test under section 275<sup>9</sup> because it was likely to divert the jury’s attention from the real issue before them and would have “seriously invaded” the complainer’s “privacy and dignity”.<sup>10</sup> At the initial appeal hearing, the court was firmly of the opinion that the evidence was collateral and, as such, not generally admissible at common law.<sup>11</sup> It was accepted that “at least an element in the rationale” for this rule was “expediency”, because dealing with collateral matters “might often protract proceedings and obscure the true issue which [is] being tried”.<sup>12</sup> The Lord Justice General took the view that it did not fall under the very limited exceptions to that policy, distinguishing it on the facts from decisions by single judges in *Green and Leitch v HM Advocate*<sup>13</sup> and *HM Advocate v Ronald (No 1)*.<sup>14</sup> Both cases involved complainers with psychological conditions which contributed to a propensity to make false complaints. However, Lords Clarke and Philip expressed doubt as to whether, as regards a false prior complaint against a third party, a distinction could be drawn between “a single such complaint and an underlying psychological or similar disposition to make such complaints”. The appeal was thus remitted to a bench of five judges “in order that a full and authoritative

6 These are the fiscal’s words, quoted by Lord Carloway in *CJM (No 2)* at para 5.

7 The judge’s “remarkably brief report” is quoted by Lord Carloway in *CJM (No 2)* at para 6. The rest of the procedural history is narrated at paras 7-9. See also *CJM v HM Advocate* [2012] HCJAC 83 at paras 5-7.

8 Criminal Procedure (Scotland) Act 1995 s 275B.

9 Under s 275(1)(c) the “probative value of the evidence” must “outweigh any risk of prejudice to the proper administration of justice” and s 275(2)(b) states the latter includes “the appropriate protection of a complainer’s dignity and privacy”.

10 *CJM (No 2)* at para 9.

11 *CJM v HM Advocate* [2012] HCJAC 83 at paras 11-17.

12 Para 20. The Lord Justice General cites the latter phrase from *Dickie v HM Advocate* (1897) 24 R(J) 82 at 83-84, generally regarded as the classic statement in trials for sexual offences where the defence seeks to use previous sexual history or bad character in order to attack the complainer’s credibility.

13 1983 SCCR 42. This is not a particularly helpful decision because following a “fresh evidence” appeal, initially remitted to Lord Cameron to hear from several witnesses on various matters including evidence of the complainer’s psychiatric disturbance and two false previous allegations of rape, the Crown did not support the conviction at appeal and the admissibility of the previous allegedly false complaints was never determined.

14 2007 SCCR 451.

review” of this issue could take place.<sup>15</sup> Ironically, the full bench did not resolve this matter.

## B. THE ADMISSIBILITY OF A COLLATERAL ISSUE

As a preliminary point, the Lord Justice-Clerk (Carloway), who gave the leading opinion, determined that the complainer’s earlier allegation was not relevant at common law because the incident “was not linked in time, circumstances or place” to the current charge.<sup>16</sup> He reiterated dicta from previous decisions to emphasise that section 275 does not provide a gateway whereby evidence which would not be relevant at common law may be admitted.<sup>17</sup> The court’s view that the earlier allegation was irrelevant because the circumstances were entirely different seems entirely correct and, in one sense, that concluded the instant appeal. Nevertheless, the court, quite correctly given the case had been remitted to it to provide guidance on a difficult issue, went on to consider whether a prior false complaint (if relevant) was inadmissible as a “collateral issue”. Lord Carloway began by observing that the only significance of the evidence would be to undermine the complainer’s credibility. The starting point was the common law, under which evidence of “bad character is, in general inadmissible... because it is collateral” to the issue at trial.<sup>18</sup> A brief review of the authorities indicated that this “well tried and tested rule” existed for “pragmatic reasons”, primarily to avoid wasting time and confusing the jury with issues of dubious relevance, but also to protect witnesses from unexpected attacks which are difficult to defend. However, Lord Carloway acknowledged that there are “recognised exceptions” to this rule,<sup>19</sup> two of which were potentially applicable here.

### (1) Proven dishonesty of a witness

The first exception to the rule that the general bad character of a witness is inadmissible as a collateral issue arises where the dishonesty of a witness can be proved by reference to established fact in the form of a previous conviction. The problem here, however, was that there was no prosecution or conviction for wasting police time, the reasons for which are not clear.<sup>20</sup> Lord Carloway went on to explain that permitting an exploration of the earlier allegation might have resulted in a prolonged “trial within a trial”, in an attempt to ascertain precisely what had happened. The complainer had not retracted all of her account, even if she did retract

15 *CJM v HM Advocate* [2012] HCJAC 83 at paras 18-20.

16 *CJM (No 2)* at para 34, clearly paraphrasing the *Moorov* doctrine.

17 Paras 34 and 44, see also Lord Clarke at para 51. The leading authority is *Moir v HM Advocate* 2007 JC 131 at paras 27 (Lord Johnston), 41 (Lord Eassie) and 44 (Lord Marnoch). See Duff (n 4) at 232.

18 *CJM (No 2)* at paras 27-29.

19 Para 32.

20 Paras 32-33.

parts of it, and “for reasons of expediency” that episode was a “collateral matter” excluded by common law.<sup>21</sup>

Lord Clarke agreed entirely that “the conduct of litigation... requires to be governed by considerations of experience and practicality”. However, he was keen to distinguish two different reasons under common law for exclusion of prior false allegations—irrelevance and being collateral, emphasising that “the words ‘collateral’ and ‘irrelevant’ do not amount to the same thing”. He sounded a note of caution against “the term ‘collateral’... being used too readily” to exclude “highly relevant” evidence, “the exclusion of which might properly be regarded as involving unfairness”. In the present context, he could not accept that “the test of relevancy falls to be determined simply by the nature of the evidence available to establish the falsity of the allegations”. That was an overly “prescriptive regime” and if prior false allegations were relevant, then it was a separate matter whether they should be dismissed as collateral, the ease of proving them false having to be balanced against the probative value of such evidence.<sup>22</sup> However, Lord Clarke accepted that in this case the prior allegation was of little relevance because of the differing circumstances and the steps necessary to investigate its alleged falsity would be “disproportionate”.<sup>23</sup>

In view of the divergent views of Lords Carloway and Clarke as to the appropriate common law approach, it is worth expanding upon the problems relating to collateral matters. Imagine if the prior allegation had been put to the complainer at trial and she had claimed that her initial report to the police was in fact true, explaining that she had been persuaded by the police to withdraw parts of her story because, for instance, the other girl had not wanted to become involved in corroborating her account. Recent empirical research carried out in England has shown that the police are only too willing to categorise allegations of rape as “false” where inessential details in the complainer’s account turn out to be inaccurate even though the main thrust of her story may well be true.<sup>24</sup> As Lord Carloway perceptively observed, “it is clear that the complainer did not retract the whole of her account. Even if she did retract parts of it, that is not to say that it did not happen.”<sup>25</sup> Once the matter had been raised, fairness to the complainer would have required the truth of the earlier allegation to be explored at the trial, which might mean having to hear evidence from relevant witnesses. The jury would then have to determine whether her previous complaint was well founded before going on to consider the matter at issue, namely whether her allegations of childhood sexual abuse were credible. It is easy to see how such “satellite litigation” would extend proceedings and might distract the jury from the principal issue.<sup>26</sup> In that light one can readily

21 Para 35.

22 Paras 50-51.

23 Para 51.

24 C L Saunders, “The truth, the half-truth, and nothing like the truth” (2012) 52 BJ Crim 1152.

25 *CJM* (No 2) at para 35.

26 For instance, *R v O'Dowd* [2009] EWCA 905 where a rape trial took over 6 months. In allowing an appeal, the Court of Appeal commented (at para 3) that “if ever there is case to illustrate the



understand Lord Carloway's insistence that a prior allegation is only admissible if its falsity is "an established fact", as proven by a criminal conviction, although I prefer Lord Clarke's more nuanced view that expediency should be tempered by the avoidance of injustice on occasion, necessitating balancing the potential probative value of the evidence against the practical problems of investigating the allegedly false claim.

## **(2) Expert evidence of a "condition" and the decision in *HM Advocate v Ronald (No 1)***<sup>27</sup>

The court also considered the claim that the complainer's prior, allegedly false, allegation was proof of a "condition or predisposition" affecting her credibility, and as such was admissible under the rape shield.<sup>28</sup> Lord Carloway first considered the position at common law because, as we have seen, if such evidence was inadmissible at common law, the rape shield did not provide an additional gateway.<sup>29</sup> At common law, Lord Carloway explained, a previous false allegation may be led, as an exception to the general rule that evidence of bad character is inadmissible as a collateral issue, where the witness suffers from a "condition" affecting his or her credibility.<sup>30</sup> In his view this only applies where there is expert evidence that the witness suffers from an "objective medical condition"<sup>31</sup> and if there is no such evidence, as in the present case, "the matter stops there as a matter of expediency".<sup>32</sup> In so far as the decision in *Ronald* seemed to depart from this principle, he invited the court to disapprove the case.<sup>33</sup> Lord Clarke observed that disapproving *Ronald* was not necessary for the disposal of the present case,<sup>34</sup> and the other three judges voiced no opinion on the matter. Having disposed of the issue under common law, Lord Carloway also noted that to be admissible under the rape shield<sup>35</sup> the "condition" or "predisposition" requires to be one which is "objectively

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dangers of satellite litigation through the introduction of bad character evidence this is it". See also D Thomas, "Sexual history evidence: whether defendant charged with sexual assault able to cross-examine complainant about previous false rape complaint" [2010] Crim LR 79; and N Kibble, "Sexual offences: whether rape complainant's previous false complaint 'misconduct' is result of personality problems" [2011] Crim LR 818.

27 2007 SCCR 451.

28 Criminal Procedure (Scotland) Act 1995 s 275(1)(a)(ii).

29 See text at n 17 above and *CJM (No 2)* at para 46.

30 Paras 36-41. See also paras 27-29.

31 Paras 36-41.

32 Para 39.

33 Para 41.

34 Para 53. He also noted that, in his view, disapproving *Ronald* would also involve disapproving the appellate judgement in *Green and Leech v HM Advocate* 1983 SCCR 42 and Lord Macphail's dicta in *HM Advocate v A* 2005 SLT 975.

35 Section 275(1)(a) requires that such evidence "demonstrate . . . any condition or predisposition to which the complainer is or has been subject".

diagnosable in medical, notably psychiatric, terms”, which was not the case here.<sup>36</sup>

*Ronald* involved a defence of consent to an alleged rape in 2005 in which the trial judge, Lord Hodge, had to determine whether a psychiatrist could give evidence not only about the complainer’s borderline personality disorder and alcohol dependency syndrome but also about other aspects of her behaviour which had led to the diagnosis. These included previous, dubious allegations of rape made by her concerning a historic incident in the early 1990s (which she reported in 2005) and a more recent incident, reported contemporaneously, in 2002.<sup>37</sup> The defence also proposed to lead evidence of the inconsistent accounts she had given to psychiatrists and the police about both of these incidents.<sup>38</sup> In the psychiatrist’s view, the previous allegations were manifestations of the diagnosed personality disorder, including a tendency to act impulsively, a lack of self control, and emotional instability which, along with the alcohol dependency, rendered allegations by a person suffering from these disorders potentially unreliable.<sup>39</sup>

Lord Hodge thought this evidence was admissible at common law because it was, in essence, expert evidence bearing on the effect of “diagnosed mental conditions on the general reliability of a witness” including reference to the factors which had informed the expert’s opinion, amongst which were the earlier rape allegations.<sup>40</sup> Thus, he concluded that it would neither be “expedient (n)or in the interests of justice” to exclude this evidence at common law<sup>41</sup> and, for the same reasons, it could be admitted under section 275 of the rape shield, although this might limit the extent of what precisely could be led.<sup>42</sup> This was the aspect of *Ronald* with which Lord Carloway disagreed in *CJM* because, while accepting that the psychiatrist’s evidence that the complainer suffered from psychiatric conditions was admissible, he thought that the “remaining elements” ought to be been have excluded. In his view the testimony of the psychiatrist and other witnesses about the complainer’s previous “unrelated”<sup>43</sup> impulsive behaviour in entering sexual relationships and falsely reporting abuse was inadmissible as collateral evidence.<sup>44</sup> Lord Carloway observed that the use of a “member of the medical profession” to “narrate these events, as revealed to him in the hearsay reports of third parties and otherwise” did not render it admissible. In short, he objected to the defence smuggling,

36 *CJM* (No 2) at para 46. See also *Moir v HM Advocate* 2007 JC 131, where Lord Johnson concluded “with some hesitation” that s 275(1)(a) requires a “recognised medical condition ... and not just to some vague notion of tendency or similar leanings” in the actions of the complainer (para 31).

37 *Ronald* at para 26. In Lord Hodge’s view, this was not inconsistent with the above dicta from *Moir*.

38 As I remarked in Duff (n 4) at n 67, the decision to prosecute in *Ronald* was perhaps surprising, although possibly a result of the political pressures on the Crown Office in rape cases, and the accused was found not guilty.

39 *Ronald* at paras 14, 15, 18 and 26.

40 Paras 18-19 and 31.

41 Para 23.

42 Paras 25-32.

43 One might query whether the previous allegations were “unrelated”. I suspect they would have satisfied a *Moorov*-type test.

44 *CJM* (No 2) at paras 39-40.

as he saw it, this evidence into the trial using the vehicle of expert psychiatric testimony.

In my view, however, Lord Hodge was justified in concluding that the evidence was relevant (owing to the similarity of the previous allegations and the instant charge) and that its admission was in the interests of justice. It would have been grossly unfair to the accused to exclude it because it went directly to the “central importance” of the complainant’s credibility and reliability in a rape case where the issue was one of consent.<sup>45</sup> Thus, I disagree with Lord Carloway’s disapprobation of *Ronald* and would support Lord Clarke’s clear reluctance to disapprove the decision. That, of course, leaves the law in a state of some uncertainty but this seems inevitable when the courts are trying to arrive at an appropriate balance between expediency and justice in a particular case. Thus, it would be sensible to resist the understandable temptation to seek certainty by creating a rigid rule against the admissibility of previous, potentially false, allegations based on somewhat arbitrarily limiting the factors which a psychiatrist can cite as contributing to the diagnosis of the medical condition of a witness.

### C. CONCLUSION

As was acknowledged in *CJM* and *CJM (No 2)*, the “collateral finality”<sup>46</sup> rule is very “fact sensitive”.<sup>47</sup> Consequently, it is extremely difficult to define the scope of the exceptions to the general rule that evidence of the bad character of a witness is inadmissible. One cannot simply implement a blanket rule which invariably sacrifices justice in the interests of expediency, which would be the result of applying Lord Carloway’s *dicta* in *CJM (No 2)*. In my view, Lord Clarke’s more flexible approach is preferable. While it entails a strong presumption that investigation of “collateral issues” should be avoided as a matter of expediency, it acknowledges that the interests of justice may override this general principle. The divergence of opinion between their lordships means that the full bench in *CJM (No 2)* did not provide any conclusive answers as regards the admissibility of, first, previous false allegations of a similar nature and, second, the nature of the evidence that may be provided by an expert witness to support a diagnosis that a witness suffers from a condition which affects his or her credibility. In my view, the attempt to formulate definitive rules or formulae to delimit the scope of these exceptions is akin to the search for the Holy Grail. The appropriate balance to be drawn between expediency and justice always depends on the infinitely variable facts of the case in question and a degree of discretion must remain with the trial judge to determine whether the evidence at issue should be admitted.

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45 *Ronald* at paras 27-28.

46 P Roberts and A Zuckerman, *Criminal Evidence*, 2<sup>nd</sup> edn (2010), 351.

47 *CJM v HM Advocate* [2012] HCJAC 83 at para 22. See also *CJM (No 2)* at para 28 per Lord Carloway and at para 50 per Lord Clarke, and the discussion in Roberts and Zuckerman, *Criminal Evidence* (n 46) 351-363.

## “Accession to Delinquence”: *Frank Houlgate Investment Co Ltd (FHI) v Biggart Baillie LLP*

At the centre of the litigation between Frank Houlgate Investment Co Ltd (“FHI”) and Biggart Baillie LLP (“BB”), now ongoing for several years, is a mortgage fraud perpetrated upon FHI by one of BB’s clients. In 2009 Lord Drummond Young dismissed as irrelevant a claim for £300,000 brought by FHI on grounds that BB had failed in a duty of care owed in negligence towards it, and that, as agents of the fraudster, BB had breached its implied warranty of authority.<sup>1</sup> A reclaiming motion was lodged, and the Inner House permitted the pleadings to be amended, which resulted in the case being remitted to the Outer House. After a further debate in 2011, Lord Glennie was not persuaded by the amended pleadings with regard to negligence and breach of warranty of authority, but he did allow a claim for £100,000, based upon BB’s participation in its client’s fraud, to proceed to proof.<sup>2</sup> The report now published is that of the proof, at which Lord Hodge found BB liable “as an accessory to fraud”.<sup>3</sup>

### A. THE FACTS

The facts demonstrate the breathtaking simplicity of identity theft. In 2004 Frank Houlgate, founding director and shareholder in FHI, had been introduced to a John MacGregor Cameron (“JMC”), a Leeds businessman who claimed to be seeking investors for his company. JMC proposed to offer as security his ancestral estate in Scotland, Balbuthie Farm in Fife. Houlgate made enquiries and ascertained that Balbuthie Farm was indeed owned by a John Cameron, and JMC duly took Houlgate to look over the property, explaining that they could not enter the farmhouse as the “tenants” had not been warned of his development plans. Gregor Mair, then a director of BB, was instructed to act on JMC’s behalf, an “all sums” standard security was drawn up in favour of FHI, and substantial amounts were advanced.

Undetected by BB,<sup>4</sup> however, the true owner of Balbuthie was in fact a John Bell Cameron (“JBC”). Eventually the “true” JBC discovered that his identity had been

1 *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2009] CSOH 165, 2010 SLT 527.

2 *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2011] CSOH 160, 2012 SLT 256; for commentary see K G C Reid and G L Gretton, *Conveyancing 2011* (2012) 121-125; R Macpherson, “Lender claims against solicitors: some thoughts from Scotland” (2012) 28 *Professional Negligence* 123.

3 *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2013] CSOH 80 at para 50.

4 Mair had queried the discrepancy in names on the title sheet. JMC first advised that this was an error, and should read “John and Bell Cameron”, since the farm was owned in common by him and a cousin named Bell. He then changed his story to the effect that he had used different middle-names to keep this transaction separate from his dealings as a Lloyds “name”. Only a copy of the land certificate was produced, not the principal, and a substitute was eventually procured.

appropriated in another transaction and he instructed his own solicitors, Stephenson and Marshall, to make enquiries. Since BB had been named as JBC's solicitors in that transaction, Stephenson and Marshall wrote to BB, in January 2007, to clarify the position. From that point on, BB was left in no doubt that its client was not the owner of Balbuthie Farm, and JMC confessed as much to Mair shortly afterwards. Uncertain as to the exact extent of his duty of confidentiality towards his client, Mair did not, however, warn FHI or FHI's agents of the fraud in relation to Balbuthie farm, far less report the matter to the Serious Organised Crime Agency or contact the Law Society for advice. He did advise his client as a matter of urgency that the security should be discharged, but allowed himself to be misled by false assurances that his client was in discussion with FHI to pay off his debt. In late January, still unaware of these developments, FHI advanced a further £100,000 to JMC, the sum claimed in this stage of proceedings. JMC notified Mair in June 2007 that a deal had been reached and a discharge should be drawn up. Mair sent the discharge to JMC who forged the signatures and the deed was duly sent to the Land Register. The fraudulent standard security was thus removed from the Register by a forged discharge.

In July 2007 FHI discovered that JMC had previously been convicted of fraud and that he did not own Balbuthie, and the deceit thereafter unravelled. Stevenson and Marshall were instructed to act for FHI, and a complaint was made to the Law Society regarding Mair's conduct. In May 2009 Mair pled guilty before the Scottish Solicitors Discipline Tribunal, which censured him and imposed a fine for continuing to act for JMC when he was aware of the fraud, failing to contact the money laundering officer in his firm, and, despite the risk of further impropriety, sending the discharge to JMC instead of direct to FHI.<sup>5</sup>

## **B. "ACCESSION TO DELINQUENCY": CROSSBORDER DIFFERENCE?**

In giving judgment against BB, Lord Hodge conceded that it might be "possible to analyse liability... in terms of implied representation", but he was not persuaded to read into Mair's actions any representation of JMC's identity or title and he discarded such an argument as "unnecessarily complicated".<sup>6</sup> The "more direct analysis" was that "Mair had to dissociate himself from the fraud and alert FHI to the risk of further loss if he wished to avoid liability as accessory to the fraud."<sup>7</sup>

The fundamental proposition upon which this case rested, therefore, was that delictual liability may derive not only from the conduct of the principal wrongdoers but also of those who "are but accessory".<sup>8</sup> Counsel for the pursuer found authority in Stair's statement that "accession to delinquency", whether "anterior, concomitant, or

<sup>5</sup> Its findings are available at [http://www.ssd.org.uk/findings/findings/1463\\_Mair\\_G\(2\).pdf](http://www.ssd.org.uk/findings/findings/1463_Mair_G(2).pdf).

<sup>6</sup> [2013] CSOH 80 at para 37, referring to *Cheshire Mortgage Corp Ltd v Grandison* [2012] CSIH 66, [2013] PNLR 3.

<sup>7</sup> At para 37.

<sup>8</sup> Stair, *Inst* 1.9.5.

posterior”, resulted in the accessory being held liable.<sup>9</sup> The notion that the rules on accession to crimes might readily be translated across to civil liability was supported by twentieth-century case-law.<sup>10</sup> Lord Hodge noted that an analogy could validly be drawn with the criminal law and the circumstances in which failure to intervene made a party an accessory to a crime.<sup>11</sup> And although they did of course dispute that Mair’s conduct was in fact accessory to the fraud, it would appear that the defenders did not offer any serious challenge to this general principle.

Across the border in England, however, opinions are divided on the liability of accessories. A person who aids and abets a crime is held to have committed that crime,<sup>12</sup> and dishonestly assisting another to commit a breach of trust is itself an equitable wrong,<sup>13</sup> but accessory liability in tort is more contentious. Glanville Williams acknowledged that “[t]he law relating to parties to a tort has not been so well worked out as that relating to parties to a crime”,<sup>14</sup> but in discussing “principal[s] in the second degree to a tort” he instanced various intentional torts for which “joint” responsibility might arise, so that, for example, “if B comes in aid of A, who beats me, although B did nothing against me, still he is a trespasser as well as A”.<sup>15</sup> Atiyah and Fleming similarly identified “cogent support both in principle and ancient authority for the suggestion that the requisite degree of participation may well correspond with the description attached by the criminal law to principals in the first and second degree”.<sup>16</sup>

The English courts, on the other hand, have taken a more restricted view. In *Credit Lyonnais v Export Credits Guarantee Department* Hobhouse LJ stated in the Court of Appeal that “knowing assistance is not enough to found tortious liability”,<sup>17</sup> and the House of Lords in that case rejected any analogy with the criminal law as “unhelpful”.<sup>18</sup> Indeed, in *Fish & Fish Ltd v Sea Shepherd UK*, in a judgment issued just twelve days prior to that of Lord Hodge, Beatson LJ reviewed the authorities in detail and asserted as the common law rule: “the law of tort does not recognise

9 Ibid, as noted by Lord Hodge at para 26. Further Institutional authority on the liability of “accessories to a delinquency” was not cited but may be found in Bankton, *Inst* 1.10.46 (vol 1, 254), and in Erskine, *Inst* 3.1.15.

10 Para 40, referring to the opinion of the Lord Ordinary, Lord Skerrington, in *Cairns v Harry Walker Ltd* 1914 SC 51 at 54, who discussed “the summary of the criminal law as to accession given in Macdonald’s *Criminal Law* (3rd ed), p 6” and saw “no reason why a different rule should apply in the case of a civil delict”. (The case is mistakenly cited as *Cairns v Henry Walker*.)

11 Para 43.

12 Accessories and Abettors Act 1861 s 8.

13 *Twinssectra Ltd v Yardley* [2002] 2 AC 164.

14 G L Williams, *Joint Torts and Contributory Negligence* (1951) 11.

15 Williams, *Joint Torts* (n 14) at 12, citing *Boyce v Douglass* (1807) 1 Camp 60, 170 ER 875.

16 C Sappideen and P Vines (eds), *Fleming’s Law of Torts*, 10<sup>th</sup> edn (2011) para 11.20 (text appears also in Fleming’s earlier editions) 256; see also P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) 295, and to similar effect P Sales, “The tort of conspiracy and civil secondary liability” (1990) 49 CLJ 491 at 509.

17 [1998] 1 LL Rep 19 at 44.

18 [2000] 1 AC 486 at 500 per Lord Woolf, echoing views on the distinctiveness of crime and tort as expressed in *CBC Songs Ltd v Amstrad plc* [1988] AC 1013.

true accessory liability, only joint liability where the person who can be termed the actual perpetrator is the agent of another person”.<sup>19</sup> He acknowledged the work of academic commentators who have continued to argue otherwise,<sup>20</sup> but insisted that “the fact that a person has facilitated the doing of a tortious act by another is not in itself sufficient to make him liable in tort. This is so even where the facilitation is done knowingly.”<sup>21</sup> This stance also finds academic support, including from Weir,<sup>22</sup> Carty,<sup>23</sup> Stevens,<sup>24</sup> and McBride and Bagshaw.<sup>25</sup> It seems, therefore, that the English courts recognise “joint tortfeasance” where the defender has “procured”, “ratified” or “authorised” the tort of another in some way<sup>26</sup> or where the defender has acted tortiously with another in furtherance of a “common design”,<sup>27</sup> but not where he or she has merely assisted or facilitated another’s tort.<sup>28</sup> It is not clear that Mair’s conduct would fall within the scope of accessory liability thus circumscribed. Mair’s inaction after his discovery of his client’s deception was professionally reprehensible, and was causally linked to FHI’s further advance of £100,000, but he could not be said to have “procured” JMC’s deceit, nor to have acted with him in pursuance of a “common design”.

The narrow “English” approach to “secondary” wrongdoing was, however, followed in a recent Scots case, admittedly in circumstances very different from those of *Frank Houlgate*. In *Cairn Energy plc v Greenpeace*<sup>29</sup> Lord Glennie (who in *Frank Houlgate* had recognised the relevancy of a case based upon the defenders’ “knowing participation in and furtherance of” JMC’s fraud) was persuaded by English authority to the effect that secondary liability in delict could arise only by “procurement” or by participation in a “common design”.<sup>30</sup> On this basis he found that, for the purposes of granting interdict, an international organisation was not a joint wrongdoer with local activists in “storming” the pursuers’ Edinburgh offices, even though it was responsible for the international campaign within which those individuals were acting. At the

19 [2013] EWCA Civ 544 at para 42.

20 Ibid, citing P S Davies “Accessory liability for assisting torts” (2011) 70 CLJ 353; J Dietrich, “Accessorial liability in the law of torts” (2011) 31 LS 231. See also S Deakin et al, *Markesinis and Deakin’s Tort Law*, 7<sup>th</sup> edn (2013) 888.

21 *Fish and Fish* at para 41. See also *Sabaf SpA v Meneghetti Ltd* [2002] EWCA Civ 976, [2003] RPC 14, aff’d [2004] UKHL 45.

22 T Weir, *Economic Torts* (1997) 32 n 31.

23 H Carty, “Joint tortfeasance and assistance liability” (1999) 19 LS 489.

24 R H Stevens, *Torts and Rights* (2007) 256-257.

25 N J McBride and R Bagshaw, *Tort Law*, 4<sup>th</sup> edn (2012) 860-864.

26 McBride and Bagshaw, *Tort Law* (n 25) 860-861.

27 *The Koursk* [1924] P 140; *Fish & Fish Ltd v Sea Shepherd UK* [2013] EWCA Civ 544 at para 45 per Beatson LJ; McBride and Bagshaw, *Tort Law* (n 25) 862.

28 On the difficulties of distinguishing assistance from procuring or participation, however, see Dietrich (n 20) at 245, and consider *Gale v Shah* [2005] EWHC 1087 (QB) in which the defendant identified the house of a person whom she knew her companions would attack, and was thus involved in a “common design” to harm the victim, rather than merely “assisting” the wrongdoers.

29 2013 SLT 570.

30 At paras 24-28.

same time, it should be noted that the Scots authorities reviewed in *Frank Houlgate* do not appear to have been considered in *Cairn Energy*.

Future developments are awaited with interest therefore. Plainly the Scots courts are not bound by English authorities, but the implications of a more or less expansive approach to accessory liability merit careful consideration. The nub of arguments against a broader doctrine is that this “risks uncertainty and the inhibition of perfectly legitimate activities”.<sup>31</sup> Accessory liability is potentially boundless, from a shopkeeper selling a kitchen knife to an individual who later uses it to commit murder, to a public authority landlord failing to warn a murder victim that one of its tenants had a grievance against him.<sup>32</sup> It should also be remembered that accessory liability is cast as a form of joint liability,<sup>33</sup> which entails that, as in *Frank Houlgate*, the pursuer may recover the total loss from the accessory who thereby bears the risk of the principal wrongdoer’s insolvency. But if the accessory is culpable to a lesser degree,<sup>34</sup> is it acceptable that the accessory should find himself or herself liable for the whole amount? After all in analogous circumstances the criminal law can apply different sanctions to principal and accessory.

Others have contended that “expanding the scope of accessory liability would help to protect rights, deter wrongs, and sanction the culpable”,<sup>35</sup> and that concerns over indeterminate liability might be addressed in English law by the use of control devices to separate out accessories “in law” from the huge potential number of accessories “in fact”. In particular, accessory liability might require: (i) a significant level of “involvement” on the part of the accessory, in the sense of “conduct that increases the likelihood of the commission of the tort”;<sup>36</sup> and (ii) “mens rea” meaning that the “accessory had knowledge of the *essential matters* of the tort that the [primary tortfeasor] intends to commit when involving himself or herself in the [primary tortfeasor’s] conduct”.<sup>37</sup> As it happens, limitations of this nature are given useful discussion in *Frank Houlgate*.

## C. THE LIMITS OF ACCESSORY LIABILITY

### (1) The connection between the accessory’s conduct and the wrongdoing

An obvious limitation on accessory liability is that a strong connection should be made out between the accessory’s conduct and the wrongdoing. In *Frank Houlgate* Lord Hodge applied a straightforward “but for” test, ruling that but for Mair’s failure to reveal the fraud FHI would not have provided the further advance of £100,000, and so

31 *Fish & Fish Ltd v Sea Shepherd UK* [2013] EWCA Civ 544 at para 44 per Beatson LJ; see further McBride and Bagshaw, *Tort Law* (n 25) 863, arguing that penalising those who knowingly assist a tort would result in uncertainty similar to that which surrounds liability for knowingly receiving assets disposed of in breach of trust.

32 The scenario in which no duty of care was held to exist in *Mitchell v Glasgow CC* 2009 SC (HL) 21.

33 Stair, *Inst* 1.5.9.

34 As discussed below in section C.

35 Davies (n 20) at 380.

36 Dietrich (n 20) at 243.

37 At 258.



in that sense BB “caused FHI to lose that sum”.<sup>38</sup> A factual causal link was therefore identified between BB’s conduct and the loss. But is the relevant link that which exists between the accessory’s conduct and the loss itself, as indicated in *Frank Houlgate*, or between the accessory’s conduct and the conduct of the principal wrongdoer? The latter approach seems to match Stair’s characterisation of accession as “anterior, concomitant or posterior to the delinquency itself”, whether by “counsel, instigation or provocation... connivance... not hindering”, assisting, abetting or “ratihabition, approbation, praise... or support of the delinquents”.<sup>39</sup> It is also consistent with the analysis of complicity in criminal acts.<sup>40</sup>

A second potential problem is that, given the complex fact patterns of accessory liability, the “but for” causation test may yield not only too many positive results (as in the case of the shopkeeper selling the knife to the would-be murderer) but also, on occasion, false negatives. For example, it might be possible to show that even without the accessory’s support, a determined wrongdoer would have gone ahead regardless and found other assistance to commit the wrong. The “but for” test is not satisfied, but should the accessory escape liability where he or she has, in Dietrich’s words, “increased the likelihood of commission of a wrong”?<sup>41</sup> The precise nature of the connection between conduct and wrongdoing will no doubt require further judicial elaboration, but in all cases the scope of liability must be further adjusted by reference to the “*mens rea*” on the part of the accessory.

## (2) The mental element on the part of the accessory

In *Frank Houlgate* the accessory’s state of mind was very different from that of the principal wrongdoer. On any view JMC had fraudulent intent; the unfortunate Mair, on the other hand, was said to have persisted in a state of “wishful unthinking” after discovery of JMC’s deception.<sup>42</sup> However, Lord Hodge set out the important principle that “in our law a person can make himself an accessory to a delict without having the mental element necessary for commission of the delict itself”.<sup>43</sup> The idea of differing levels of culpability between accessory and principal has been taken up elsewhere.<sup>44</sup> Indeed, a “two-tier” approach to assessing the mental element can be observed in the

38 Para 49.

39 Stair, *Inst* 1.5.9.

40 The criminal law analogy is discussed further in Davies (n 20) at 354-357, and see J Gardner, “Complicity and causality”, in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) 57 at 76: “The essential difference between accomplices and principals is that accomplices bring wrongdoing into the world through principals... An accomplice is one who acts with the consequence or result that the principal commits the wrong.”

41 Dietrich (n 20) at 243.

42 [2013] CSOH 80 at para 42 per Lord Hodge.

43 Para 40.

44 See e.g. Williams, *Joint Torts* (n 14) at 15, suggesting that there may be circumstances in which “each defendant should as a matter of justice be considered separately”. Fraud was not included specifically in the list of intentional torts discussed by Williams, but he noted the problems of joint libel, where in relation to qualified privilege, it might be appropriate to look for differing levels of “malice” as between the wrongdoers.

*US Restatement (Third) of Torts: Apportionment of Liability* § 14 which provides for liability on the part of a person who, negligently or otherwise, has failed to protect the plaintiff “from the specific risk of an intentional tort” at the hand of another. At the same time, it is important to state clearly the minimum threshold of culpability.

“Subjective dishonesty” is said not to be essential, but while “*some* knowledge and a failure to enquire might suffice” for fraud in the wider sense of bad faith in contract law, Lord Hodge suggested that “*actual* knowledge” might be required for accession to fraud in delict.<sup>45</sup> The necessary mental element was inferred here from Mair’s inaction on acquiring actual knowledge of the fraud in the midst of a live transaction, given the foreseeability that if he did not act, further funds would be obtained from the pursuer.<sup>46</sup> This seems therefore to entail a form of recklessness, in the sense of indifference to the probable and known risk of wrongdoing by the principal. At the same time, the decision in *Frank Houlgate* signals that one may become an accessory to a delict through inaction, in circumstances where no primary duty of care existed in negligence, and without the level of culpability necessary for commission of the delict as principal. A cautious steer may be required on this point, therefore, in order to prevent subversion of the law of negligence, in which foreseeability alone is not generally sufficient to ground a positive duty to prevent a person from being harmed by the criminal act of a third party.

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## Batman Fails to Heed the Lone Ranger and Gets Hurt... Ha Ha!

Sometimes it is unwise to disregard advice. When that advice consists of an instruction not to leave the path, ignoring it may prove perilous indeed. Contrary to the clear instruction of her mother, Little Red Riding Hood left the path to pick flowers, giving the wolf the opportunity to reach her grandmother’s house ahead of her.<sup>1</sup> Had twelve dwarves paid closer attention to Gandalf’s parting injunction at the edge of Mirkwood (“Good-bye! Be good, take care of yourselves – and DON’T LEAVE THE PATH!”<sup>2</sup>) they might not have become a tasty meal for giant spiders. Both tales work out well in the end, but things could so easily have been otherwise had disaster not been averted in each case by the hero.

<sup>45</sup> Para 45, emphasis added.

<sup>46</sup> Para 46.

<sup>1</sup> Brothers Grimm, *The Complete Fairy Tales* (Vintage edn, 2007) 125-126 (reported *sub nom* Little Red Cap). Not all versions of the story contain the instruction to stay on the path.

<sup>2</sup> J R R Tolkien, *The Hobbit* (Harper Collins edn, 1996; first published 1937) 127.

### A. *COWAN v THE HOPETOUN HOUSE PRESERVATION TRUST*

Huntsmen and hobbits were, however, conspicuous by their absence when sixty-one-year-old John Cowan, disregarding an earlier instruction to keep to the paths, took a shortcut in the dark across the east lawn of Hopetoun House and fell some five feet into the ditch of the ha-ha.<sup>3</sup> Mr Cowan, who was recovering at the time from an operation for thyroid cancer, incurred a serious fracture to his ankle.

Mr Cowan had taken his five-year-old grandson, Ross, to Hopetoun House for a guided “bat walk”, an annual event open to the public on payment of a fee. The walk took a route through rough parts of the grounds which provided habitat for various breeds of bat. On the night in question the walk commenced in the car park and finished at the ranger’s centre at the north end of the house, by which time it was completely dark. Visitors then had to make their own way back from the ranger’s centre to the car park. Had Mr Cowan stuck to the path the accident would never have happened, but he was on unfamiliar territory, never having visited Hopetoun House before, and, spotting a set of car headlights off to his right, he became convinced that the path was taking him in the wrong direction and left it to take what seemed to him a more direct route across the lawn.

The Occupiers’ Liability (Scotland) Act 1960 imposes a duty on the occupiers of property to take reasonable care to guard persons entering the premises against dangers due to the state of the premises or arising from things done on the premises.<sup>4</sup> The common law is relevant to liability under the Act in determining the identity of the occupier, but this was not contentious in *Cowan*. Nevertheless, the action brought by Mr Cowan was grounded on both the Act and the common law. This should be unnecessary but the practice, which has attracted criticism in the past,<sup>5</sup> clearly continues.

There was no real scope for arguing that no duty was owed to Mr Cowan by the proprietors. The case for the defenders rested on the contention that the danger to which the pursuer fell victim was outwith the scope of their duty and, even if that was found not to be the case, there had been no breach of duty. The defenders also ran a plea of contributory negligence.

The contentious issue in *Cowan* was whether the occupiers’ duty of care extended to the ha-ha. Normally, there is no duty to protect against obvious and permanent features of the landscape,<sup>6</sup> which is how the ha-ha was described by counsel for the defenders. Lord Bracadale, however, found the ha-ha to be “an unusual feature of a concealed nature, particularly in the dark [and] not within the scope of the authorities as to obvious dangers”.<sup>7</sup> The ha-ha was held to be a danger due to the

3 *Cowan v The Hopetoun House Preservation Trust* [2013] CSOH 9.

4 Section 2(1).

5 See B Gill, “Obligations” in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) para 318. W J Stewart, “Pleading the Occupiers’ Liability (Scotland) Act and the common law: a solution to a logical problem” 2007 JR 53.

6 See A McAllister, “Occupiers’ Liability” in J M Thomson (ed), *Delict* (2007) para 17.36 and cases discussed therein.

7 *Cowan* at para 36.

state of the premises within the meaning of the Act and, therefore, within the scope of the defenders' duty. The pursuer's submission, that the ha-ha presented a reasonably foreseeable risk of serious injury to unaccompanied and unfamiliar visitors, appears to have been accepted.

The onus of establishing the standard of care fell, of course, upon the pursuer. The suggestion offered by counsel, that the ha-ha should have been lit or fenced, was dismissed as being disproportionate. At the start of the walk Peter Stevens, the ranger employed by the defenders,<sup>8</sup> had advised the visitors to follow him and to stick to the paths. Counsel contended that this instruction ought to have been repeated at the end of the walk, and this was accepted. At the end of the walk the ranger had indeed provided a further briefing without any specific reference to the ha-ha, but which included instructions on how to return safely to the car park. However, it appears that Mr Cowan did not hear these instructions as he was taking his grandson to the toilet at the time. Having rejected the suggestion that the ranger ought to have escorted all visitors back to the car park, Lord Bracadale stated that the duty would have been "adequately met by the giving of clear instructions to everyone in the group".<sup>9</sup> He suggested that Mr Stevens might have led visitors to the front of the main building and pointed out the safe route before repairing to the ranger's centre for tea and bat chat.<sup>10</sup> Less had been done than ought reasonably to have been done, accordingly the defenders were held to be in breach of their duty.

The defender's plea of contributory negligence was accepted, though the pursuer's contribution to his injury was held to be 75% rather than the 80% contended for by the defenders.<sup>11</sup> While there was conflicting evidence, it was established that Mr Cowan was not paying close enough attention to where he was going, particularly in view of the fact that he was carrying a relatively powerful torch with new batteries which he seems not to have used to any effect. Perhaps he was gazing upwards in the hope of sighting more bats.

## B. ANALYSIS

Neither the finding that the defender's employee took less than reasonable care to protect the visitors from danger, nor the finding on contributory negligence is especially remarkable. The critical point of the case is that the ha-ha was found to be a danger due to the state of the premises and thus within the scope of the occupiers' duty. There is considerable case law on obvious dangers, old authorities still being relevant,<sup>12</sup> but the law has been reviewed relatively recently in the Inner House<sup>13</sup> and Lord Bracadale found sufficient statements of the law in modern reports. It is

8 Not strictly "lone" as he was assisted by Mrs Carol Terry, a nurse and member of the local "bat group", whose evidence was judged not entirely reliable.

9 *Cowan* at para 38.

10 *Ibid.*

11 Para 39.

12 *Stevenson v Glasgow Corporation* 1908 SC 1034 and *Taylor v Glasgow Corporation* 1922 SC (HL) 1 were cited by the defenders in *Cowan* at para 29.

13 *Fegan v Highland Council* 2007 SC 723.

apparent that determination of this issue is not to be reduced purely to the question of whether or not the danger is obvious.

*Fegan v Highland Council*<sup>14</sup> was a case brought by a woman who had fallen over a cliff at Thurso. The defenders were granted decree of absolvitor following a proof before answer. The pursuer's appeal was dismissed in the Inner House, the opinion of the Court being delivered by Lord Johnston, who stated:<sup>15</sup>

In general terms an occupier of land containing natural phenomena such as rivers or cliffs, which present obvious dangers, is not required to take precautions against persons becoming injured by reason of those dangers unless there are special risks such as unusual or unseen sources of danger.

While this makes clear that the normal rule may be subject to qualification, the source of danger in *Cowan* was not a natural, but an artificial i.e. man-made, feature and so it was found helpful to turn also to *Graham v East of Scotland Water Authority*,<sup>16</sup> an action brought in the Outer House by the widow of a farmer who had drowned in Glencorse reservoir. In *Graham* Lord Emslie stated:<sup>17</sup>

I agree. . . that the abstract concept of "obviousness" is not per se a satisfactory test in this area of the law. It is, however, relevant to note that in the earlier authorities that term has generally been used to denote features of the environment which are permanent, ordinary and familiar. Natural landscape features plainly fall into that category, and in my opinion the same applies to long standing artificial features which are neither concealed nor unusual, nor involve exposure to any special or unfamiliar hazard.

If this is a sound statement of the law it may well prove inadequate to describe a danger as obvious or not without addressing the specific elements listed in elaboration. In *Cowan* counsel for the defender attempted to cover all bases, arguing that:<sup>18</sup>

there was nothing special, hidden or unusual about the ha-ha. . . a historical and permanent feature of the grounds which had been there for around 300 years. . . a feature that existed in many estates and gardens throughout the country. . . an obvious feature which was clearly visible on approach to the house, certainly during daylight.

This submission could scarcely have been better stated. Its failure was attributable in no small measure to the nature of a ha-ha itself. Concealment is of the essence of a ha-ha. The Shorter Oxford English Dictionary suggests that the term ha-ha may originate from "the cry of surprise on discovering the obstacle". It is designed to provide a border to a lawn without interfering with or distracting from the vistas enjoyed from the house, and it was from the house, and in the dark, that Mr Cowan made his approach.

14 2007 SC 723.

15 At 729.

16 2002 Rep LR 58.

17 At 61.

18 *Cowan* at para 30.

While in *Graham* it was suggested that a history of accidents or complaints might bring a danger that does not appear unusual, unseen, unfamiliar or otherwise special within the scope of the duty,<sup>19</sup> Lord Bracadale held in *Cowan* that an absence of previous accidents or complaints was not a consideration that could be given much weight.<sup>20</sup> Notwithstanding the alleged presence of ha-has in country houses,<sup>21</sup> Lord Bracadale was firmly of the view that this was “an unusual feature about which someone crossing in the dark would be likely to be unaware”.<sup>22</sup> He also considered the annual bat walk itself to be an unusual event, because visitors were not normally brought onto the property after dark. In short, a clean record gained in normal circumstances will not be decisive when circumstances change significantly.

Lord Bracadale described the case as being fact specific.<sup>23</sup> This appears to be an inherent feature of occupiers’ liability and *Cowan* serves as a useful reminder that the question of what care is reasonable “always relates to the particular person in the case”.<sup>24</sup> It follows that the circumstances under which a person comes onto the property continue to be factually relevant notwithstanding the abolition of the rigid categories of invitee, licensee and trespasser.<sup>25</sup> Whether that relevance is truly restricted to the factual question of reasonable care or intrudes into the issue of duty may provide scope for further discussion. If there is any merit in the contention of counsel for the pursuer in *Graham* that “the ambit of an occupier’s duty required to be considered afresh in the circumstances of each particular case”,<sup>26</sup> then, in the context of obvious dangers at least, some conceptual overlap may be found between the existence of the duty and its breach.

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## The Agent’s Warranty of Authority: Thus Far but No Further

As a general rule, an unauthorised agent is unable to create binding legal relations between his principal and a third party. The third party who is unaware that the agent lacks authority suffers disappointed expectations, since the anticipated contract with

19 *Graham* at 61 per Lord Emslie.

20 *Cowan* at para 36.

21 It is understood that ha-has feature in John Buchan’s *Huntingtower* and possibly also in George Eliot’s *Middlemarch*, though the author does not claim to have read either.

22 *Cowan* at para 36.

23 Para 38.

24 Gill (n 5) para 325 with reference to s 2(1) of the Act: “[b]ecause the duty to the person in the 1960 Act is to show reasonable care ‘that that person will not suffer injury or damage’” (emphasis added).

25 Ibid. See also DM Walker, *The Law of Delict in Scotland*, 2<sup>nd</sup> edn (1981) 581 and 585.

26 *Graham* at 60.

the principal does not materialise, and is protected in different ways. The principal may choose to ratify the transaction, in which case it becomes binding on both parties from the moment the agent purported to enter into it on the principal's behalf. The principal who does not wish to ratify may nevertheless have created the impression that the agent was authorised, potentially resulting in apparent authority. This legal concept operates to prevent the principal from acting in an inconsistent way by creating then denying the appearance of authority and if the third party raises an action against the principal, the latter is barred from denying that the agent was authorised. Both ratification and apparent authority focus on the relationship between principal and third party. However, the third party also has a valid action against an agent who has misrepresented the existence or extent of his authority, namely the action for breach of warranty of authority. There is very little Scottish case law on this action, and so the recent Inner House joined cases, *Cheshire Mortgage Corporation Limited v Grandison* and *Blemain Finance Limited v Balfour Manson LLP*,<sup>1</sup> provide a welcome analysis of the legal principles.

### A. NATURE OF THE WARRANTY

An agent provides an implied warranty to third parties that he is authorised by his principal. If that warranty proves to be incorrect, provided the third party relied on the warranty and has suffered a loss, the agent may be liable in damages to the third party.

The action is an unusual one and appears not to be a native Scottish concept, having simply been adopted into Scots from English law. It is based on an implied contract and as such imposes strict liability on the agent, with the result that even the agent who honestly believes he is authorised will be liable to the third party in damages if such a belief was incorrect.

In these joined cases the attempt to extend the ambit of the warranty of authority was unsuccessful. Lord Clarke, delivering the Inner House decision, stated:<sup>2</sup>

We are of the clear view that there are no reasons in principle or practice, for extending the somewhat limited scope and nature of the implied warranty of agents in the way in which the reclaimers' submissions in the present case contended for.

### B. THE FRAUDULENT SCHEMES

These cases arose as a result of fraudulent schemes, the nature of which can be illustrated by reference to the facts in *Cheshire*. A man and a woman approached lenders purporting to be real individuals, the aptly-named Mr and Mrs Cheetham of 34 Danube Street, Edinburgh. The couple requested a loan which was to be secured over the property in Danube Street. The fraud was very convincing as the fraudsters possessed a number of documents including drivers' licences and utility bills. On the

1 [2012] CSIH 66, [2013] PNLR 3.

2 [2012] CSIH 66 at para 31.

day the offer letter was issued, they consulted a solicitor, instructing him to act on their behalf. They explained that the title deeds had been lost and extract registered title deeds were produced. The solicitor acted only for the borrowers (and not also the lenders) in procuring the loan from the lenders. Once the loan had been obtained the fraudsters disappeared leaving the lenders with a standard security which, having been granted by a non-owner, was ineffective.

The lenders chose to sue the solicitors acting for the fraudsters on the basis of warranty of authority. It is well established that a solicitor acting as an agent warrants to the party his client is transacting with (on these facts, the lenders) that he was authorised. But does the solicitor further warrant that his client is who he claims to be? This is the essential question raised by the joined cases, namely, as is so often the case in agency, which of two innocent parties should bear the loss caused by fraudulent actions.

### C. OUTER HOUSE DECISION<sup>3</sup>

In the Outer House Lord Glennie rejected the lenders' submissions:<sup>4</sup>

...it is, in my opinion, difficult to see any room for any implied representation by the solicitors as to the identity of the borrowers for whom they were acting, other than that they were acting for the people with whom the lenders were already engaged in a process of finalising a loan transaction. Borrowing from Willes J's formulation of the warranty in *Collen v Wright* [1857 8 E & B 647], the solicitors here in each case did not (sic) more than warrant "that the authority which (they professed) to have, did in point of fact exist."

It was clearly relevant to Lord Glennie that the borrowers approached the lenders directly, and were not introduced by the solicitors.

Lord Glennie also shed light on the legal basis of the action. Drawing on the judgment of Buxton LJ in *SEB Trygg Liv Holding AB v Manches*<sup>5</sup> he noted that it is based on an implied collateral contract existing between agent and third party. This is, of course, a legal fiction: there is no such contract. The contractual analysis causes difficulties in English law because of the requirement of consideration since the third party who benefits from the warranty seems to "get something for nothing". Consideration is, however, found in the act of the third party in entering into the contract with the principal. Although Lord Glennie recognised that consideration is not a requirement in Scots law, he nevertheless felt that it served a useful function:<sup>6</sup>

...the acts which amount to consideration may also indicate the acceptance necessary to turn the representation or unilateral promise by the agent into a contract between the agent and third party collateral to that purportedly entered into between the third party and the agent's professed principal.

His reference to a unilateral promise is interesting and is revisited below.

<sup>3</sup> *Cheshire Mortgage Corporation Limited v Grandison* [2011] CSOH 157, 2012 SLT 672.

<sup>4</sup> [2011] CSOH 157 at para 64.

<sup>5</sup> [2006] 1 WLR 2276 at para 60.

<sup>6</sup> [2011] CSOH 157 at para 56.



To Lord Glennie, outcomes are highly dependent on the facts:<sup>7</sup>

...one cannot simply assume the existence of a warranty of authority in all cases. It is necessary in each case to look at the relationship between the parties, and to examine closely what was said, expressly or impliedly, by the agent in the context of that relationship, how what was said could reasonably have been understood by the other party (the test, as always in contract, being objective.)

This provides a reminder that the warranty is an implied one, shaped by the nature of the legal relationship between agent and third party. An express warranty is possible, if unlikely.

Quoting the decision of Lord Drummond Young in a recent case concerning a similar type of fraud, Lord Glennie confirmed the limited scope of the warranty:<sup>8</sup>

Thus the representation relates to the person for whom the supposed agent purports to act. It does not relate to the capacity in which that person, the supposed principal, will enter into the transaction, or as to the property that person holds, or as to that person's title to property.

Finally, he confirmed that liability is strict: it makes no difference to the agent's liability that he honestly believed himself to be authorised.<sup>9</sup>

Returning to the facts, Lord Glennie sought to establish whether the warranty in this case could extend to the principal's identity. He emphasised the high degree of contact between the mortgage company and the fraudsters before the solicitor became involved.<sup>10</sup>

Of particular importance, to my mind, is the fact that, by the time the borrowers' solicitors became involved, the lenders knew who they were (or thought they were) dealing with. They had made the decision in principle to lend to those individuals.

Lord Glennie's decision illustrates the fact that the third party must be induced by the agent to enter into a contract with the principal: if the third party knows that the agent is not authorised, there can be no action for breach of warranty.

Although the researches of counsel could find no reported Scottish case in which an agent had actually been held liable for breach of warranty of authority, judicial analysis nevertheless exists in cases such as *Anderson v Croall*,<sup>11</sup> *Rederi Aktiebolaget Nordstjernen v Christian Salvesen & Co*,<sup>12</sup> *Irving v Burns*,<sup>13</sup> and *Scott v JB Livingstone & Nicol*.<sup>14</sup>

7 Ibid.

8 Para 57, quoting from *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2009] CSOH 165, 2010 SLT 527 at para 27.

9 Para 58.

10 Para 63.

11 (1903) 6 F 153.

12 (1903) 6 F 64.

13 1915 SC 260.

14 1990 SLT 305. To these could be added *Royal Bank of Scotland v Skinner* 1931 SLT 382, in which Lord MacKay confirmed the requirement of reliance on the warranty.

### D. INNER HOUSE DECISION<sup>15</sup>

The Inner House decision begins with the statement of principle from Willes J in *Collen v Wright*:<sup>16</sup>

I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue... The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such a contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise.

Lord Clarke characterised this statement as the simple process of implying a term into mercantile transactions, drawing an analogy with the implied terms in the Sale of Goods Act 1979 and the Bills of Exchange Act 1882.

He noted that this action had been received into Scots law from English law, making reference to a statement of the law contained in Gloag and Henderson, *The Law of Scotland*.<sup>17</sup> He also referred to *Irving v Burns*<sup>18</sup> both to illustrate the fact that the third party must actually suffer a loss and to emphasise the limited nature of the warranty. If the contract with the principal would have been a losing one anyway, for example because the principal was insolvent, the agent has not caused a loss and will not therefore be liable in damages.

Given that this is an English concept, reference was made to the leading English text, which states:<sup>19</sup>

The basic warranty is only that the agent has authority from his principal: this is something particularly within the agent's knowledge. If the principal proves unreliable, that is something in respect of which the third party could have made inquiries. Merely as agent, therefore, the agent does not warrant that his principal is solvent, or will perform the contract (if any). As can be seen below, in the context of litigation, the warranty is similarly limited in that the agent (normally a solicitor) does not promise that a claim is valid.

Lord Clarke noted (as Lord Glennie had done in the Outer House) the classification in English law as a collateral contract and the requirement of consideration.<sup>20</sup> *Excel*

15 [2012] CSIH 66, [2013] PNLR 3.

16 1857 8 E & B 647 at 657.

17 Lord Coulsfield and H L MacQueen, *Gloag and Henderson: The Law of Scotland*, 12<sup>th</sup> edn (2007) para 19.26, contributed by Lord Coulsfield.

18 1915 SC 260.

19 P G Watts and F M B Reynolds, *Bowstead and Reynolds on Agency*, 19<sup>th</sup> edn (2010) art 105.

20 [2012] CSIH 66 at para 26.

*Securities Ltd v Masood*,<sup>21</sup> a case involving a similar identity fraud, was described by the court as being “good law for Scotland”.<sup>22</sup> Lord Clarke quoted from the opinion of Judge Hegarty in that case:<sup>23</sup>

An agent acting on behalf of an unidentified principal will not normally incur any personal, contractual liability so long as he acts within the scope of his authority. Anyone contracting with such an agent must look to the principal for any redress to which he is entitled as a matter of contract. However, it is now well established that, in such circumstances, the agent will normally be regarded as giving an implied warranty as to his authority. If, therefore, he never had authority to act on behalf of the principal or if his authority has terminated or if he exceeds the scope of his authority, he will be in breach of the implied warranty and will be liable in damages to any person to whom the warranty was given. In the common case, where the principal refuses to accept liability, the right of action against the agent for breach of his warranty will be an effective substitute for the loss of any right of action against the principal.

Judge Hegarty had noted the decision in *Penn v Bristol & West BS and Ors*<sup>24</sup> and concluded that, notwithstanding the result, it was not the case that the solicitor always warranted his client's identity. The Inner House agreed.<sup>25</sup> Lord Clarke concluded as follows:<sup>26</sup>

The identity of a person is made up from a bundle of qualities or attributes. In particular there is nothing in principle in the law of contract to prevent an agent from guaranteeing to a third party that he has a principal who is the same person as appears on property registers, for example, as the owner of a specific property. . . . but, in any event, where, as here, no such express warranty was asked for, or given, matters must rest on the implied, warranty of authority to be implied as a matter of law the extent and nature of which was defined correctly in the Excel case.

## E. CONCLUSIONS

In outlining the limitations on this concept, the Inner House provided a reminder of the policy reasons behind it.<sup>27</sup> The agent is in a better position than the third party to verify whether he is actually authorised. As such, it seems fair to allow the loss to fall on the agent rather than on the third party, who might find it difficult to establish the limits of the agent's authority. On these particular facts, to extend the warranty further to encompass the client's identity would be to place on the solicitor a risk which is the lender's risk in making a commercial decision to lend.<sup>28</sup> It would, in effect, make the solicitor a type of insurer of the lender's losses. Given the forceful terms of Lord

21 [2010] Lloyds Rep PN 165.

22 [2012] CSIH 66 at para 28.

23 Para 29.

24 [1997] 1 WLR 1356.

25 [2012] CSIH 66 at para 29.

26 Para 30.

27 Para 29.

28 As explained in *Excel Securities Ltd v Mahood* [2010] Lloyds Rep PN 165 at para 102.

Clarke's judgment, future attempts to extend the warranty in other ways are equally unlikely to be successful.

Whilst the restatement of the limitations is welcome, these joined cases highlight the unusual nature of the warranty. The imposition of strict liability on the agent, although the natural result of basing the action in contract, is harsh. A contractual legal basis seems to have arisen through historical accident rather than any deliberate choice: the action was developed before the rise of negligence in delict. Following *Hedley Byrne v Heller*,<sup>29</sup> a third party could choose to raise an action against the agent for misrepresentation in delict. Unsurprisingly, there are few examples of third parties choosing this path. The contractual action, which compensates the third party for his disappointed expectations, is likely to result in a higher award of damages than would be the case were the agent to choose the delictual route. However, if the agent fraudulently misrepresented the extent of his authority, higher damages would be available in delict. The contractual legal basis is now firmly embedded in the law.

The existence of the contractual legal basis is all the more unfortunate bearing in mind that the contract is a legal fiction. In English law it is based on an implied collateral contract, consideration being provided when the third party enters into a contract with the principal in exchange for the agent's promise. The contract is unilateral in nature. Scots law has simply adopted this action from English law without pausing to ask whether a neater legal basis in Scots law would have been the unilateral promise.<sup>30</sup> The agent can be characterised as promising to the third party that he is authorised. When this promise is breached, the third party has an action against the agent for damages. Promise more accurately reflects the one-sided nature of the dealings between agent and third party, for the third party bears no obligation towards the agent. Neither legal team in the joined cases appears to have raised promise as a possible legal basis in the Inner House, despite Lord Glennie's brief reference to promise in the Outer House, as noted above.

Given the English attitude towards privity of contract, promise cannot be used as a legal basis in English law. This explains the choice of the collateral contract, and the search for consideration. It is unsatisfactory that Scots law has simply adopted a solution which is framed by the presence of consideration in English law. The Inner House having confirmed the nature of the action, it now seems unlikely that promise could be considered as an alternative legal basis. This, in turn, is indicative of a wider problem, namely the failure to take account of promise as a possible solution in commercial situations. It is a flexible and useful part of Scots law, particularly bearing in mind that, in a commercial context, it need not be in writing.<sup>31</sup> Complex commercial contexts often involve the interaction of numerous commercial actors and

29 [1964] AC 465.

30 The current author originally made this suggestion in "Unauthorised agency in Scots Law", in D Busch and L Macgregor (eds), *The Unauthorised Agent: Perspectives From European and Comparative Law* (2009) 261 at 291-296.

31 Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).

the ability to recognise binding unilateral legal commitments is a facet of the Scottish system which is unfortunately often ignored.

These are criticisms which relate to the structural nature of the action. It would, of course, be unreasonable to expect the court completely to reshape the remedy in the context of litigation. More radical change would only be possible if the issue were considered by the Scottish Law Commission. In the meantime, we should welcome the Inner House's refusal to extend an already anomalous concept in a way which would have been practically unworkable for the solicitors' profession as a whole.

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## Unjustified Enrichment Claims: When Does the Prescriptive Clock Begin to Run?

Two recent judgments of the Outer House of the Court of Session have considered the question of when prescription starts to run in relation to an unjustified enrichment claim. Unfortunately both judgments contain, it is respectfully submitted, errors of analysis which suggest that the Scottish courts are not yet fully at ease with the reformed law of unjustified enrichment developed in the so-called "enrichment revolution" of the late 1990s. The present author has recently called, in discussing another unjustified enrichment decision, for further development of the law by the Inner House.<sup>1</sup> The cases discussed below add further weight to this call.

Claims in unjustified enrichment are based upon a cause of action which rests, in broad terms, on the principle that no-one should be unjustifiably enriched at the expense of another.<sup>2</sup> This principle may be broken down into several elements which must be present before a claim in unjustified enrichment arises: (1) a gain made by the defender, (2) at the expense of the pursuer, (3) which is unjustifiably retained by the defender. One might also add a fourth requirement, that no relevant defence is available to the defender, but this final consideration is not of primary importance in calculating when prescription runs in enrichment claims. For that calculation, what is crucial is the moment when the defender unjustifiably retains an enrichment at the pursuer's expense. It is that concurrence of the specified elements (1) to (3) above that constitutes "the date when the obligation became enforceable", which is the time specified in section 6(3) of the Prescription and Limitation (Scotland) Act 1973 as the moment from which the five year prescriptive period applicable to obligations arising from unjustified enrichment begins to run.

<sup>1</sup> See M Hogg, "Continued uncertainty in the analysis of unjustified enrichment" 2013 SLT (News) 111.

<sup>2</sup> *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151 at 155 per Lord President Hope.

### A. *VIRDEE v STEWART*

This first of the two recent cases, *Virdee v Stewart*,<sup>3</sup> concerned a family dispute over improvements made to land. The land in question was owned by the defender (who was the brother of the pursuer), the pursuer having built a croft on it in the early 1990s, with the defender's permission, with the intention that she and her family would be able to stay in the croft as and when she wished. The defender allowed them to do so for a number of years. The pursuer also occasionally let the croft out, keeping the income derived from such lettings. In 2009 her relationship with her brother broke down, at which point he took possession of the croft. The pursuer knew that she did not own the land on which the croft was built. She did not aver any belief that by building on the land she would acquire any legally enforceable interest in it, nor that she had entered into any contract with the defender regarding her use of the croft or the acquisition of any interest in it. The pursuer raised an action against the defender claiming recompense in the amount of £170,000 in respect of the defender's having been unjustifiably enriched by retaining the benefit of the croft built on his land. The defender argued that the pursuer's claim had prescribed, prescription having begun to run on any such claim by August 1994 at the latest, well after the five year prescriptive period specified under the 1973 Act.

Having reviewed the standard modern authorities on unjustified enrichment, Lady Smith concluded that:<sup>4</sup>

... it is clear that, as a matter of law, the defender was enriched as soon as the house was completed - at that point it can readily be inferred that the value of that part of the land on which his house was built would have been significantly enhanced. Further, that was an enrichment which, again, as a matter of law, was wholly unjustified because he had no legal right or entitlement to it.

Lady Smith expressed the view that, contrary to what had been suggested in some of the pursuer's pleadings, this was not a case of the *condictio causa data causa non secuta*, there being no future cause for which the pursuer had made any transfers to the defender. That being so, the only point at which the defender gained an unjustified enrichment was when the construction of the croft was completed in 1994. Any claim which she might, therefore, have against him in unjustified enrichment had prescribed in 1999 and on this basis she dismissed the claim.

There is, however, some difficulty with Lady Smith's analysis of the case. Most cases of unjustified enrichment through improvement of another's property concern circumstances where the improver mistakenly, but *bona fide*, believes the property to be his own. However, this was a case where the improver knew that the land was not hers and knew, therefore, that by improving it she was conferring an enrichment which would accrue to another party. If any claim in unjustified enrichment which she might have was not therefore classifiable as the improvement of land in the *bona fide* but mistaken view that it was the pursuer's, it logically must be classified in some other

3 [2011] CSOH 50.

4 Para 24.

way. Lady Smith does not seek to classify the claim (save to reject it as an instance of the *condictio causa data causa non secuta*), but the obvious alternative classification is as an instance of the *condictio ob causam finitam*, that being a claim in respect of an enrichment conferred for the continuation of a cause which subsequently ceases to operate. The continuing cause in this case could be said to be the defender's ongoing permission to the pursuer and her family to occupy the croft, a cause that ceased in 2009 when the parties' relationship broke down. It was at *that point* (and not the date construction of the croft was completed) that the defender's enrichment became unjustified, and it was at that point—in 2009, not 1994—that a claim in unjustified enrichment became available to the pursuer.

This analysis is consistent with what was said by Lord President Hope about the prescription of a recompense claim in *NV Devos Gebroeder v Sunderland Sportswear Ltd*,<sup>5</sup> namely that the claim for recompense “came into existence when all the facts necessary to establish it had occurred, and from that moment the pursuers were in a position to make a relevant claim for recompense based on those facts”.<sup>6</sup> Assuming that the characterisation of the claim as the *condictio ob causam finitam* is correct, it was necessary for the fact of the pursuer's exclusion from the property to come into existence before the claim of recompense could arise. The mere enrichment of the defender in 1994 was not sufficient. In response to the question, “could the pursuer have sued the defender in recompense in 1994?”, the answer must surely be no because the defender could have answered, “I am not unjustifiably enriched, as I am quite willing to permit the cause for which the enrichment was given to me—namely, giving permission for the pursuer and her family to occupy the croft—to continue. I may thus be enriched, but my enrichment is not unjustified.” While Lady Smith correctly noted the time of enrichment, she did not do so in respect of the time at which the enrichment became unjustified.

This analysis suggests that Lady Smith ought not to have held that prescription extinguished the pursuer's claim in 1999. On the contrary, the five year prescriptive period did not begin to run until 2009, meaning that a claim raised in 2010 was well within the prescriptive period. The approach taken in *Virdee* was misguided, the mistake arising from a failure to categorise the precise nature of the pursuer's claim. Had it been correctly categorised as the *condictio ob causam finitam*, the court's attention would have been drawn to the proper focus of the enquiry, namely the point at which the defender's justification for retaining the enrichment (the *causa* of his enrichment) ceased to operate. It was not until the pursuer was excluded from the croft that he was unjustifiably enriched.

### B. THOMSON v MOONEY

The error made in *Virdee* was repeated in *Thomson v Mooney*.<sup>7</sup> In this case, the parties began to cohabit in 2005. Having become engaged to be married, in June

<sup>5</sup> 1990 SC 291.

<sup>6</sup> At 301.

<sup>7</sup> [2012] CSOH 177.

2005 they purchased a house in Airdrie for £180,000, each of them taking a one half *pro indiviso* share in the subjects. The pursuer contributed £70,000 from his own funds to the purchase price, the remainder being raised through a loan from Bristol and West plc. The relationship failed and the parties ceased to cohabit in September 2007. The pursuer stopped paying instalments on the loan in October 2007 and the house was sold in December for £160,000. The proceeds of the sale were used to repay the loan from Bristol and West, and also to repay a loan from the Royal Bank of Scotland which the defender had taken out to finance her business. Following payment of those sums, the net sale proceeds were approximately £35,806.

The pursuer averred that the sum of £70,000 had been paid by him on the understanding that the parties would be married and would continue to live together. He further averred that he paid money into the defender's business and agreed to be jointly liable with the defender for a business loan obtained from the Royal Bank of Scotland in the sum of £106,050. The pursuer therefore claimed that the defender had been unjustly enriched in two respects:

- (1) she had been enriched to the value of £35,000 in respect of the payment of £70,000 that he made when the house was acquired. Half of the total sum paid by him amounted to a contribution towards her one half *pro indiviso* share of the house; and
- (2) she had been further enriched by the pursuer's contributions to her business in the sum of £57,178, and by a further sum of £11,256, which was the portion of the proceeds of sale of the house used towards the repayment of the defender's share of a loan for her business.

In consequence, the pursuer claimed payment of two sums (£35,000 and £68,434) from the defender on the basis of unjustified enrichment in the form of recompense.

The defender counterclaimed for payment of £8,943.25, based on a right of relief. She further argued that the pursuer's claim for £35,000 had prescribed by virtue of section 6 of the 1973 Act, arguing that prescription had begun to run when she first became enriched, namely in June 2005 (the date when the pursuer had contributed funds towards the house purchase). By contrast, the pursuer argued that it was only when the parties separated in September 2007 that her retention of the enrichment became unjustified, and only then that the prescriptive clock began to run.

Giving judgment, Lord Drummond Young held in favour of the defender in respect of the prescription point, but on the other aspects of the claim he ordered a proof before answer. On the prescription point, it is suggested that his lordship reached the wrong decision. He founded heavily on the remark of Lord President Hope in *NV Devos Gebroeder v Sunderland Sportswear Ltd* quoted above, holding that what was crucial to the raising of a recompense claim (and hence to the start of the prescriptive clock) was the concurrence of (i) enrichment on the part of the defender, and (ii) the lack of a legal ground justifying retention of the benefit. So far so good: crucial to the raising of an unjustified enrichment claim (specifically, in this case, one where the remedy of recompense is sought) is both that the defender



be enriched at the pursuer's expense and that retention of such enrichment be without any legal cause. Where Lord Drummond Young fell down, however, was in relation to the same issue upon which Lady Smith went awry, namely his analysis of the second element, the point at which retention of the enrichment became unjustified. He rightly identified the contribution of the pursuer's £70,000 to the house purchase as the point when the defender was enriched by a one half share of that sum (June 2005). But he failed to analyse properly the nature of the pursuer's claim as an instance of the *condictio causa data causa non secuta* (the pursuer argued that in contributing £70,000 to the house purchase he intended a transfer to the defender of one half of that £70,000 which was conditional on a future cause, the parties' intended marriage).<sup>8</sup> While that marriage remained in contemplation, the defender had a legal ground (or *causa*) to retain the value transferred to her, namely the parties' intended marriage. However, when the relationship ended and the wedding was called off, the intended marriage failed to materialise and the defender's justification for retaining the benefit ceased. While fulfilment of the condition was in prospect, the defender had a ground to retain the benefit; when the condition failed, such ground ceased to exist and her retention of the benefit became unjustified.

However, Lord Drummond Young failed to apply this logic. He argued instead that when a transfer is made in contemplation of marriage "absence of a legal ground is present from the outset".<sup>9</sup> This is a remarkable statement, as it effectively holds that, in the case of a *causa data causa non secuta*, there is *never* any valid *causa* to begin with and a transferor would be quite entitled to demand the return of the thing at any time whether or not the event specified as the reason for the transfer occurred. Lord Drummond Young adds an example to justify this view:<sup>10</sup>

...for example, if a man transferred funds to his fiancée in contemplation of their marriage but then discovered that he required the money to pay a debt and thus avoid sequestration, there can be little doubt that he would be entitled to return of the money at once.

Unfortunately, there is more than a serious doubt that this is *not* the law. In Lord Drummond Young's bizarre example the man may get his money back at any point, even if the marriage is still contemplated; but if that is so, why does the *condictio causa data causa non secuta* even exist if one does not need to wait until the *causa*

8 Lord Drummond Young characterises the pursuer's claim as an instance of the *condictio causa data causa non secuta*, seeing the contemplated marriage as the future *causa* for which the enrichment was transferred. Alternatively, it would have been possible to have brought the facts of the case within the *condictio ob causam finitam* by characterising the parties' relationship as a continuing cause which came to an end. The pursuer's agent seems to have vacillated between these two possibilities (see para 8). Either ought properly to have led the court to the conclusion that unjustified retention of the enrichment did not arise until the parties' relationship ended (the point, it seems, at which the wedding was called off).

9 Para 13.

10 Para 13.

is *non secuta* before a claim may be made? For good measure, he adds the further remark that:<sup>11</sup>

No doubt in some cases of this nature there may be an intention to make a gift, but that would clearly be inconsistent with obligation to make recompense and the pursuer would fail on that ground, without regard to prescription.

This also makes little sense: gifts are most certainly *not* inconsistent with a claim for recompense, so long as the gift is made conditionally; if it is, then the failure of the condition gives a perfectly good ground for seeking return of the gift.

Lord Drummond Young sought further support for his position by citing the judgment in *Virdee*. Given the criticism that has been levelled at *Virdee*, its citation adds nothing useful to his Lordship's reasoning; on the contrary, citation of *Virdee* merely serves to compound the same error made in *Virdee* and amounts to a regrettable entrenchment of that approach. Lord Drummond Young ought to have held that retention of the enrichment only became unjustified when the parties' contemplated marriage was called off. Only at that point did the *causa* under which the transfer was made fail to follow (i.e. was *non secuta*). That being so, the pursuer's claim to the £35,000 ought not to have prescribed.

### C. CONCLUSION

These two cases point to a difficulty which courts are experiencing in understanding the nature of the reasons (the *causae*) in respect of which enrichments may be transferred. Such reasons may be conditional, giving rise to cases where a recipient of an enrichment will originally have an entitlement to retain or make use of an enrichment, but will cease to be so entitled when a continuing reason for the transfer ceases (*ob causam finitam*) or when an expected reason fails to materialise (*causa data causa non secuta*). In such cases, it is only when the entitlement ceases that retention of the enrichment becomes unjustified and prescription begins to run on unjustified enrichment claims. A failure to appreciate this, and a mistaken finding that unjustified enrichment claims arise at the very moment of conferral of the enrichment, will lead (as occurred in the two cases discussed) to incorrect application of the rules of prescription and injustice to pursuers through denial of perfectly valid claims.

At the first opportunity, the Inner House (or Supreme Court) must take steps to overrule the prescription aspects of *Virdee* and *Thomson*. If such an opportunity also permits further general development of the law of unjustified enrichment, identified previously by the present writer as being necessary,<sup>12</sup> so much the better. At this crucial stage in the continuing reform of the law of unjustified enrichment we cannot afford to allow bad decisions to bed in.

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<sup>11</sup> Para 12.

<sup>12</sup> Hogg (n 1).

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## A Forgotten Law and Policy Issue as Independence Looms: Nuclear Waste Management in Scotland

The United Kingdom has a unique constitutional landscape in comparison to any other nuclear state. Due to devolution within the UK the current pro-nuclear policy faces a challenge not previously encountered. Competence to legislate in certain areas is now shared with the Scottish government and regional assemblies in Wales and Northern Ireland. The issue of nuclear waste management raises particular problems for Scotland with the vote for Scottish independence looming.

### A. FORTHCOMING LEGAL PROBLEMS

The main legal problem is that Scotland, as a devolved power, has no competence over nuclear energy installations<sup>1</sup> yet has full competence in respect to environmental matters and planning.<sup>2</sup> The Scottish parliament has rejected the idea of deep geological disposal facility (“GDF”)<sup>3</sup> and also new nuclear build.<sup>4</sup> However, this does not answer the question of what happens to radioactive waste at Scottish nuclear sites and also Scottish-produced legacy waste which is stored at Sellafield. The problem has been exacerbated by the Scottish independence campaign and, as Cameron points out, “there is therefore a mesh of vertical and horizontal lines of authority that will impact upon policy implementation”.<sup>5</sup>

This legal dilemma will be further intensified in an independent Scotland (or in a Scottish parliament with greater devolved powers) and already politicians have voiced their concerns, especially regarding the legal position of Scottish higher activity waste (“HAW”) at Sellafield. This is a key legal problem given that under European Union law it is ultimately the responsibility of member states to manage spent fuel and radioactive waste. Moreover, it is possible for two or more member states to agree to use a common disposal facility under strict conditions.<sup>6</sup> Furthermore, European Union law now obliges member states to develop national programmes for nuclear waste disposal and to notify them to the European Commission by 2015 at the latest. These national programmes must include a timetable for the construction of disposal

1 Scotland Act 1998 sch 5 part II D4.

2 Sch 5 part II D4 exceptions (a) and (b).

3 Scottish Government, *Scotland's Higher Activity Radioactive Waste Policy 2011* (2011) 4-5, available at <http://www.scotland.gov.uk/Resource/Doc/338695/0111419.pdf>.

4 Scottish Government, *Scottish Energy Policy: An Overview* (2008) 7, available at <http://www.scotland.gov.uk/Resource/Doc/237670/0065265.pdf>.

5 P D Cameron, “A revival of nuclear power: an analysis of the legal implications” (2007) 19 JEL 71 at 84.

6 Council Directive 2011/70/Euratom OJ L199/48 “establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste”. For a brief summary see [http://europa.eu/rapid/press-release\\_IP-11-906\\_en.htm](http://europa.eu/rapid/press-release_IP-11-906_en.htm).

facilities, as well as a description of the activities needed to implement disposal solutions, costs assessments and a description of the financing schemes.<sup>7</sup> In addition, every ten years member states are required to invite and conduct international peer reviews in order to exchange experience and to ensure the application of the highest standards.

Jamie Reed MP voiced concerns at Westminster as to whether the government will commit itself to an analysis of the volumes of Scottish HAW which is stored in England, the costs to remove them, where they will be located in Scotland, and who will be responsible for them in the long term.<sup>8</sup> A Scottish government statement in reply suggested that proposals for nuclear decommissioning in an independent Scotland would be covered in a white paper to be published in November 2013.<sup>9</sup> What this white paper proposes for the management of the obligations Scotland may have will be very interesting, especially concerning nuclear waste which has been removed from Dounreay, Hunterston, Torness and Chapelcross and taken to Sellafield. This issue is becoming more complex and the timing is open to question concerning the Nuclear Decommissioning Authority's ("NDA") plans to make around fifty rail shipments over the next five years from the Dounreay nuclear site in Caithness to the Sellafield reprocessing complex in Cumbria.<sup>10</sup> These plans, which involve the transportation by train of forty-four tonnes of radioactive uranium and plutonium, have met with considerable opposition from local authorities concerned about accidents and terrorist attacks.<sup>11</sup> This in turn provides an insight into future problems relating to the Scottish nuclear waste dilemma. The five-year timescale could easily lead to the NDA transporting waste from what could be a foreign country post-2015.

## B. THE PRESSURE OF TIME

If Scotland gains independence from the UK the waste must return to Scotland where there are neither facilities nor any legal framework in place to deal with the problem.<sup>12</sup> Furthermore, will a new legal framework be needed in which Scottish taxpayers are liable for their share of the cost of keeping the waste in England? Considering the fact that the UK has not yet enacted any legislation directly

7 Council Directive 2011/70/Euratom OJ L199/48 ch 2 art 5 (a)-(h).

8 "Nuclear waste Bill threat to Scotland", Scottish Express, 22 January 2012.

9 "Cumbrian MP says Scotland must take waste back under independence", News and Star, 18 October 2012.

10 Nuclear Decommissioning Authority, *Preferred and Credible Options for DFR Exotic Fuel* (2011), available at <http://www.nda.gov.uk/news/dfr-exotic-fuel-options.cfm>.

11 "Nuclear train route to Sellafield runs into opposition from local councils", The Guardian, 26 August 2011.

12 For further detail see the Scottish Environmental Protection Agency website which contains reports on the issue dating back to 2007, available at [http://www.sepa.org.uk/radioactive\\_substances/radioactive\\_waste/higher\\_activity\\_waste\\_guidance.aspx](http://www.sepa.org.uk/radioactive_substances/radioactive_waste/higher_activity_waste_guidance.aspx).

concerning nuclear waste<sup>13</sup> the potential problems created by Scottish independence, or by the more likely outcome of near-complete devolution, are very real.

The UK is advancing its own policy in this area<sup>14</sup> but the Scottish government has yet to engage fully with the issue in the debates surrounding independence. An independent Scotland would need its own independent nuclear waste storage facility,<sup>15</sup> and by having a lower number of nuclear energy plants it would not benefit from economies of scale. Moreover, the timescale means that existing Scottish nuclear power sites will be decommissioned before any robust interim storage facility or GDF can be built. This has the potential to become a significant legal problem in the near future.

It is surprising that Scottish policy on this issue has escaped any detailed scrutiny from either Holyrood or Westminster<sup>16</sup> but instead has been characterised by environmental rhetoric such as the importance of “precautionary” and “proximity” principles.<sup>17</sup> Scotland has firmly rejected the GDF policy and instead seeks long-term interim storage. However, any mention of intermediate storage in respect of nuclear power plants is often followed by criticism that intermediate storage is risky due to natural disasters and terrorism. This argument has been strengthened since the accident in Fukushima.<sup>18</sup>

### C. LEARNING FROM EUROPE

The Scottish context must be placed within comparative European experiences of dealing with nuclear waste. In sharp contrast to Scotland, France (alongside Finland and Sweden) has embraced the idea of GDF for storing nuclear waste.<sup>19</sup> A 2006 revision of the French Waste Management Act<sup>20</sup> agreed the one-billion-euro construction of the extensive Meuse/Haute Marne underground nuclear waste facility

13 It should be noted that the current Managing Radioactive Waste Safely (MRWS) Programme has ground to a halt following the exit of Cumbria County Council (the only “volunteer” community) from the process for a variety of reasons. The Council also exercised its legal right to veto the plans which resulted in an end to the GDF development plans.

14 For further detail on UK policy developments in the area see <https://www.gov.uk/government/policies/managing-the-use-and-disposal-of-radioactive-and-nuclear-substances-and-waste/supporting-pages/providing-policy-for-the-safe-and-secure-disposal-of-radioactive-waste>.

15 Either long-term storage or GDF.

16 Jamie Reed MP has stated (n 9) that he has “been trying to raise this for the best part of two years. I’ve written to the Prime Minister but he is not interested, I’ve written to the First Minister but I didn’t even get an acknowledgement of my letter. . . Westminster and Holyrood can’t just pretend there isn’t happening. It just isn’t right for my constituents to accept the risk and for English taxpayers to pay for the disposal and storage of nuclear waste from Scotland if it becomes a foreign country.”

17 World Nuclear Association, *Fukushima Accident 2011* (2013), available at [http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident-2011/#.UWXJ\\_hlRGcM](http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident-2011/#.UWXJ_hlRGcM).

18 Ibid. See also T N Srinivasan and T S Gopi Rethinaraj, “Fukushima and thereafter: reassessment of risks of nuclear power” (2013) 52 Energy Policy 726.

19 French Ministry for Ecology, Sustainable Development and Energy, *Plan National de Gestion des Matières et des Déchets Radioactifs 2013-2015* (2013), available at [http://www.developpement-durable.gouv.fr/IMG/pdf/13030\\_PN-dechets-radioactifs-2013\\_complet\\_def\\_light.pdf](http://www.developpement-durable.gouv.fr/IMG/pdf/13030_PN-dechets-radioactifs-2013_complet_def_light.pdf).

20 Loi n° 2006-686 du 13 juin 2006 relative à la transparence et à la sécurité en matière nucléaire.

near Bure in north east France. This effectively became the home of a new National Radioactive Waste Management Agency (ANDRA) designed to research the viability of the site, which is due to receive nuclear waste in 2025. A major shift from a centre-right to a left-wing government has, at first sight, caused tension in France's national commitment to GDF. Nevertheless, in response to President Hollande's commitment to reduce dependency on nuclear energy from 75% to 50%, Batho, the centre-left minister for Ecology, Sustainable Development and Energy, commented, "[w]e must ensure its safe conditions, regardless of our energy mix".<sup>21</sup>

The GDF preference should be understood (worryingly for the UK) in light of controversies in the mass transportation of waste between Germany, France and the Netherlands. Thousands of protesters have obstructed nuclear waste rail transportation since the 1990s, and most recently in 2012 and 2013 there have been seven individual high-profile instances resulting in police arrests.<sup>22</sup> Energy company Areva estimates that 200 such operations take place across Europe each year, albeit this amounts to only 1% of all dangerous goods transport in and out of EU member states according to the European Commission.<sup>23</sup> The requirement of member states to develop national disposal plans for the construction of appropriate facilities (potentially shared, as stated above) certainly does not exclude transportation concerns.<sup>24</sup> European experience would suggest, nevertheless, that such transportation should be minimised. These cases demonstrate the lengthy timescale, durable commitment and geographical considerations required for nuclear waste decisions that have hitherto been absent, or worse ignored, in the Scottish case.

## D. CONCLUSION

The UK is currently at an advanced stage of expanding its nuclear energy industry, yet the problem of nuclear waste disposal remains unresolved. Scotland has taken the opposite view to the UK both with respect to the future of nuclear power and how to deal with the waste that Scotland is liable for. In an independent or further devolved Scotland the task of building the necessary installations for nuclear waste disposal will be a significant cost to a new nation. However, there is also a lack of a legal framework, and this should be addressed with immediate effect.

Scotland has certain questions to answer in relation to its energy sector prior to the vote on independence. These include oil and gas; climate change; and nuclear waste management. The oil and gas issue is not the focus here, nor is climate change, but they do have relevance for a discussion of nuclear waste management. Climate change targets have been missed by Scotland, and although the Scottish government

21 French Ministry for Ecology, Sustainable Development and Energy, *Pour un égestion intégrée et cohérente de l'ensemble des déchets radioactifs*. Communiqué de Presse, 25 April 2013.

22 M Gay, *Septs Militants Condamnés*. *L'Est Republicain* (2013) 24-26.

23 AREVA, *Le Transport des Combustibles Nucléaires Usés, des Déchets Vitriifiés et Compactes* (2012) Rapport XI.

24 See Council Directive 2011/70/Euratom OJ L199/48 "establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste", ch 2 art 5 (a)-(h); also [http://europa.eu/rapid/press-release\\_IP-11-906\\_en.htm](http://europa.eu/rapid/press-release_IP-11-906_en.htm).

has stated that they are still on track to meet the targets, another issue has not been addressed.<sup>25</sup> Nuclear energy provides between 35% to 45% of Scotland's electricity needs. Since nuclear power plants are scheduled to come off line in approximately fifteen to twenty years time and there are no plans for any new nuclear build in Scotland, there is a looming threat to the climate change target. To date, the Scottish government has not addressed the question of how nuclear energy as an electricity provider will be replaced.

The nuclear waste management issue and the nuclear energy area in general are open to further research and debate in Scotland particularly due to the fact that the UK legal framework in relation to nuclear waste management remains unresolved. The legitimacy deficit that has been created, as well as the loss of trust in stakeholders, will have to be repaired in order to deliver successfully a UK nuclear waste disposal policy. For Scotland, a clear agenda needs to be established and a new legal framework developed prior to the independence referendum. Considering the short timeframe involved, the opportunity to agree on new policy and legislation is of grave concern.

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## High Hedges and Neighbours

Whilst Scotland cannot lay claim to many entries within the "tallest/largest" category much beloved by readers of The Guinness Book of Records, it does have at least one: that of being home to the tallest and longest hedge in the world, namely the Meikleour Hedge in Perth and Kinross, which extends to one hundred feet in height and nearly one third of a mile in length. Thought to have been planted shortly before the Battle of Culloden, such is its scale that trimming it is a six week task undertaken once a decade by a team of four men. It is a thing of beauty to behold.

However, for the unfortunate few, having a high hedge in proximity to their home is far from aesthetically pleasing and the blocking of light to neighbouring homes caused by towering hedges has become a favourite topic for the press. Growth in urban density of the population coupled with shrinkage in size of the average modern house has led to the planting of many fast-growing hedges in order to protect privacy. Once planted, these hedges which can often grow at a rate of three to four feet per

<sup>25</sup> For further detail see Scottish Parliament News Release, "Climate change plan must improve if Scotland is to meet its targets finds Rural Affairs, Climate Change and Environment Committee", 22 March 2013, available at <http://www.scottish.parliament.uk/newsandmediacentre/61441.aspx> and "Scottish targets for climate change missed", BBC News Online, 7 June 2013.

annum, can be neglected by their owners (and their successors in turn) and operate as a trigger for potential disputes as well as detracting from the visual amenity once enjoyed by a property.

### A. BACKGROUND

In Scotland hedges have had the capacity to be used as weapons to block out light in highly polarised neighbour disputes. No planning permission is required to plant one and there are no restrictions as to the height of their growth. Affected parties appear not to have attempted thus far to apply the common law of nuisance nor one of the statutory nuisance definitions under section 79(1)(a) of the Environmental Protection (Scotland) Act 1990, as amended by the Public Health (Scotland) Act 2008, of a high hedge simply being regarded as “a nuisance” per se to counter what, in many cases, could be regarded as an intolerable interference in the use or enjoyment of their property. Lawyers appear reluctant to use nuisance as a basis for actions of interdict and specific implement. High hedges can have an adverse effect on the architectural relationship between buildings by virtue of their sheer disproportionality, thus potentially also having a detrimental effect on the marketability and saleability of affected adjacent properties. A towering high hedge near a property being marketed for sale could be construed as a potential marker of bad neighbours by prospective viewers. Whilst many surveyors would be loath to support this view directly in the absence of comparable data based on sales of identical properties within the same area, one being affected by a proximate high hedge and the other not, it is surely arguable that this would deter potential buyers.

However, the potential for high hedges to act both as the root cause of a neighbour dispute or as further ammunition in the same context is about to change by virtue of the High Hedges (Scotland) Act 2013, which received Royal Assent on 2 May 2013 and is anticipated will be brought into force in early 2014. The Act, which campaign groups such as Scothedge have sought for many years, was first proposed as a private member’s Bill in 2002 and legislation with broadly comparable aims was introduced in England and Wales in 2003,<sup>1</sup> in the Isle of Man in 2005 (where it extends to single trees),<sup>2</sup> and most recently in Northern Ireland in 2011.<sup>3</sup>

The statute will give to local authorities powers to settle high hedge disputes between neighbours which have reached an impasse or, indeed, in situations where one party simply refuses to engage in any meaningful discussion regarding the possible impact that the height of his hedge is having on the quality of living of the affected party. Respondents in the consultation process in Scotland were overwhelmingly in favour of high hedge disputes being decided by a local authority, as opposed to through the courts, in light of the positive experience of this approach

1 Anti-Social Behaviour Act 2003 Part 8.

2 Trees and High Hedges Act 2005.

3 High Hedges Act (Northern Ireland) 2011.



being adopted in England and Wales and perceived benefits in both speed and cost.<sup>4</sup> Section 2(1) of the Act provides for applications to be made to a council by an owner or occupier where they consider that a high hedge on neighbouring land is having a detrimental effect on the reasonable enjoyment of their domestic property. The new legislation does not extend to commercial properties and land does not necessarily need to share a boundary with the property affected by the hedge to fall within the ambit of the dispute which the local authority will determine.

## B. HIGH HEDGES

Whilst the genesis of the statute was well publicised, namely neighbour issues with fast-growing and robust Leylandii trees, the ultimate definition of what constitutes a hedge was extended to include deciduous trees as well as beech hedges, although single trees do not fall within the scope of the Act. The intent of the legislation is to provide a mechanism for dispute resolution, as opposed to a narrow focus on the horticultural side of what may or may not constitute a high hedge, and it reserves extremely wide powers for the Scottish Ministers to vary the meaning of a high hedge and to “make different provision for different cases” to this end. A high hedge is defined within section 1 of the statute and is stated to be a hedge which is formed wholly or mainly by a row of two or more trees or shrubs which forms a barrier to light and rises to a height of more than two metres above ground level. In measuring the height, roots of any hedge are disregarded and a hedge will not be regarded as forming a barrier to light if it has gaps which significantly reduce its overall effect as a barrier to light at heights of more than two metres.

The impact of high hedges on properties is limited strictly by the statute to consideration of any diminishing effect upon light enjoyed by the neighbouring property and does not extend to any effect upon views, nor does it operate as a mechanism for complaints about the roots of any hedges which may result in the blocking of drains. The word “reasonably”, as one might anticipate in legislation intended to assist with neighbour dispute impasses, features consistently throughout the Act and the relevant local authority will be required to interpret reasonableness upon receipt of a suitable application from an affected party, presumably taking into account traditional nuisance factors such as the character of the neighbourhood, convention and the impact upon the affected person. Each application will be considered on its own merits and, as such, the standard will be difficult to define precisely. Applications must be accompanied by the appropriate fee, the amount of which has yet to be determined, but is expected to be somewhere in the region of £325 to £500.

Key among the provisions, however, is the necessity under section 3(1) of the statute for the applicant to have taken “all reasonable steps to resolve the matters in relation to the high hedge” before making any application to the local authority. Applicants must first consider whether they have met the guidance to be issued in

4 Scottish Government, *Consultation on High Hedges: An Analysis of Responses* (2010), available at <http://www.scotland.gov.uk/Publications/2010/03/25102917/0>.

due course by individual local authorities as to these steps. In looking to comparable guidance notes issued by English councils, it is thought likely that a local authority might stipulate that an applicant must have attempted to resolve matters by means of community mediation, which is often available at no cost in situations where an impasse has been reached or where communication has broken down. If parties are receptive to mediation this approach may prove effective, as often so-called “hedge rage” can be a culmination of incremental neighbour disputes and may be indicative of a wider problem which might readily be addressed by dialogue facilitated by a trained mediator even in cases where it appears that a deadlock has been reached. In light of the requirement to have taken all reasonable steps, it would appear prudent for prospective applicants to keep a chronology of sorts of their attempts to resolve the dispute as well as evidence of this where possible, for instance, copy letters. If the applicant has not demonstrably met the criteria under section 3(1) there is a risk that the application will be dismissed. The local authority similarly has powers under section 5 to reject any application which is thought to be “frivolous or vexatious”. A potential example of a dismissal-worthy application may be where someone applies repeatedly to obtain a notice although the physical nature of the contended hedge has not changed. Such provisions evidence the legislators’ consciousness that neighbour law itself can operate as potential ammunition in long- entrenched battles between feuding neighbours.

The relevant local authority must give every owner and occupier of the land where the hedge is growing a copy of the application and the owner or occupier subsequently has twenty-eight days to make any representations which are, in turn, copied to the applicant. Once the period has expired, it falls to the local authority to determine the outcome and in reaching a decision it has a statutory duty to consider whether the high hedge in question is of historical or cultural significance. Whilst the Act itself does not state that any biodiversity value be taken into account, a local authority would need to observe the general duty to consider this factor under section 1 of the Nature Conservation (Scotland) Act 2004.

Any high hedge notice issued will stipulate the action deemed necessary to remedy the adverse effect created by the hedge, or to prevent the recurrence of the adverse effect, or both, and will advise the owner of the land where the hedge is sited that there is a right of appeal under section 12 of the statute. A notice is binding upon every person who is the owner of the land specified but it is not possible to register or record the notice in the Land Register nor in the General Register of Sasines. The relevant local authority has the powers to enforce compliance with the action prescribed in the notice and entry to the land on which the hedge is planted can be authorised by a sheriff or justice of the peace on application. Where it is necessary to enforce compliance, expenses (which can comprise those for remedial action, or administrative costs plus interest thereon) are thereafter recoverable from the owner with accompanying powers for the council to register a notice of liability for these within the relevant property register. The right of appeal for both an affected party and the hedge owner lies to the Scottish ministers who, in turn, may appoint a person for that decision-making purpose. In England and Wales the planning inspectorate carries out this role.

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### C. IMPACT

Looking to the English and Welsh experience to gauge the likely volume of applications under the new Act, only a small proportion of the large number of initial enquiries from affected parties became formal applications to be considered by councils, and the number has remained in the region of 400 per annum since the legislation was introduced.<sup>5</sup> Mere awareness through the media of the impending powers to be assumed by local authorities had the effect of encouraging high hedge owners to remedy matters rather than risk being compelled to take action by a council. Perhaps there was concern that the issue of a notice might be perceived as a victory of sorts by the neighbour with whom they were in dispute. It remains to be seen whether the wealth of publicity generated by the passing of the Scottish Act has the effect of similarly moderating behaviour north of the border. However, the introduction of a mechanism of both resolution and enforcement for those who have quite literally lived in the shadow of blight caused by a towering hedge, is a welcome development within neighbour law.

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<sup>5</sup> Scothedge, *Response to Consultation High Hedges and other Nuisance Vegetation* (2009), 4, available at [http://www.scothedge.colwat.com/files/SCOTHEDGE%20RESPONSE%20TO%20CONSULTANCY\(Final3\).pdf](http://www.scothedge.colwat.com/files/SCOTHEDGE%20RESPONSE%20TO%20CONSULTANCY(Final3).pdf).